

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Application by Qwest Communications)	
International, Inc., for Provision)	
Of In- Region, InterLATA)	WC Docket No. 02-148
Services in Colorado, Idaho, Iowa,)	
Nebraska and North Dakota)	

**EVALUATION OF THE
COLORADO PUBLIC UTILITIES COMMISSION**

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I. EXECUTIVE SUMMARY

The Colorado Public Utilities Commission (COPUC) recommends that Qwest Communications International, Inc. (Qwest) be permitted to enter the interLATA market in Colorado. After a rigorous and exhaustive two and one-half year evaluation, the COPUC concludes that Qwest meets the requirements of § 271(c) of the Telecommunications Act of 1996 (Act), thus warranting a grant of in-region, interLATA authority. As the U.S. Department of Justice (DOJ) would have it, the COPUC concludes that Qwest has taken the necessary steps to make the local exchange and exchange access markets “fully and irreversibly open to competition.”

The COPUC has attempted to assemble the record and decide the issues related to § 271 approval in a logical, narrative fashion that gives all interested parties a map of the issue development and a rationale for our decisions.¹ In the end, the COPUC urges the FCC to find as we do, that Qwest has met the requirements of § 271. To reach this conclusion, we urge the FCC to regard this record as a whole, looking neither too broadly, such that its mere scope and duration merits a passing grade; nor too narrowly, where slightly imperfect results or inchoate processes would send the application back and thus postpone benefits to Colorado consumers for significant market opening gains.²

Specifically, the COPUC concludes Qwest meets the requirements of:

¹ More than one state regulator of a literary bent has connected § 271 to *Bleak House*: “Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises . . . Jarndyce and Jarndyce has passed into a joke.” Charles Dickens, *Bleak House* Ch. 1, p.3 (Oxford: 1991, orig. 1853). Just who is Jarndyce or Jarndyce in this process is best left obscure, but the excruciating length and breadth of this § 271 proceeding has led to diminishing returns, despite remarkable market opening steps accomplished through its course.

² We have called this our Goldilocks analytic: neither too hard, nor too soft. See Decision No. R01-1142-I, Docket No. 01-041T, *Decision on Motions to Modify* at p. 10 (Mailed Nov. 6, 2001), *Qwest Application*, App. K, Vol 2, Tab 115.

A. Track A

Qwest fulfills § 271(c)(1)(A) (Track A) by having entered into over 100 interconnection agreements with competitive local exchange carriers (CLECs). The COPUC has approved the agreements pursuant to § 252 of the Act.

B. SGAT

These Track A interconnection agreements are accompanied in this application by the most thorough Statement of Generally Available Terms and Conditions (SGAT) in the country. The SGAT runs some 636 pages, was developed collaboratively by the participants in the § 271 process, and provides CLECs with a concrete and specific legal obligation to provide access to and interconnection with Qwest's network. Furthermore, the SGAT is a crucial part of Qwest's compliance with the 14-point competitive checklist from § 271(c)(2)(B).

C. OSS

The operational support systems (OSS) test further verifies Qwest compliance with the 14-point competitive checklist. The Qwest OSS test is the most rigorous and comprehensive test conducted to date of a Bell Operating Company (BOC). Developed collaboratively by 13 of the 14 Qwest states and conducted under the oversight of the Qwest Regional Oversight Committee (ROC), the OSS test analyzed 711 criteria. The test administrator, KPMG Consulting (KPMG), and the pseudo-CLEC, Hewlett-Packard Consulting (HPC), concluded Qwest satisfied 645 criteria, leaving 11 criteria "not satisfied," 3 criteria "not applicable," 25 "unable to determine," and 27 labeled "diagnostic." The COPUC analyzed the test results, reviewed areas in which Qwest fell

short of a passing grade, yet still maintains that the test – taken as a whole – demonstrates Qwest’s OSS meets the competitive checklist criteria.

D. TELRIC Pricing

The COPUC completed a new round of total element long run incremental cost (TELRIC) wholesale rate setting in advance of this § 271 filing. The new rates, from COPUC Docket No. 99A-577T, represent substantial reductions from Colorado’s previously applicable rates for unbundled network elements (UNEs).³ These new rates should make it easier for competitive local exchange carriers to enter the Colorado local exchange market, while continuing to compensate Qwest for the costs of its network.

E. Performance Assurance Plan

The COPUC has imposed – and Qwest has acceded to – what we believe is the most potent and meaningful performance assurance plan (PAP) yet required of a BOC. The COPUC paid particular attention to implementing a rigorous PAP. Indeed, we regard the CPAP, or Colorado Performance Assurance Plan, as the single most important innovation of this § 271 process. On a going-forward basis, the CPAP provides meaningful incentives for Qwest to meet its wholesale unbundling obligations, compensates CLECs for harm suffered, and provides flexibility to adapt to changing market conditions.

³ As the FCC itself has acknowledged, the COPUC does not regard ever-lower ratcheting of UNE rates as an unqualified good. Nonetheless, we do emphasize that we took a fresh look at Colorado’s UNE rates and recalibrated them to meet TELRIC criteria.

F. Change Management

Qwest's change management process (CMP) has undergone a complete overhaul during the § 271 process. It is now compliant with the FCC's change management criteria. The COPUC staff has closely monitored CMP, and through no small amount of goading, Qwest has brought it into compliance.

G. § 272 Affiliate

Qwest satisfies § 272. The COPUC makes the predictive judgment regarding the future behavior of Qwest that adequate structures, safeguards, procedures, and separations are in place to ensure compliance with § 272.

H. Public Interest

The COPUC concludes that Qwest's interLATA entry will benefit the welfare of Colorado consumers, and thus concludes that § 271 authority is in the "public interest, convenience and necessity" under § 271(d)(3)(C). Despite prodigious and diffuse pleading to the contrary, we find that there are no countervailing considerations that would warrant postponing this clear benefit to our state's consumers.

I. Conclusion

The COPUC held a series of collaborative workshops to ensure Qwest's compliance with the 14-point checklist. The longest and most detailed SGAT ever, for better or worse, has been submitted to the FCC – the result of six COPUC staff reports, 12 hearing commissioner orders, and COPUC decisions. The COPUC has participated exhaustively in the most rigorous OSS test ever and an ongoing CMP redesign process, which has resulted in a passable change management system. Phase 1 of a rigorous pricing docket has concluded, with new, TELRIC-compliant rates. The public interest

test has been met, the separate affiliate requirement has been met, and Track A has been met. Most importantly, the COPUC has devised the most significant performance assurance plan in the country to date.

For the foregoing reasons, and pursuant to its obligation under § 271(d)(2)(B) of the Act, the COPUC recommends that the FCC approve Qwest's § 271 application to offer in-region, interLATA service in Colorado.

II. PROCEDURAL BACKGROUND

This recommendation culminates four separate dockets, full participation in the Regional Oversight Committee's Operational Support Systems Test, and COPUC staff (staff) participation in a collaborative change management redesign process.

On November 30, 1999, Qwest's predecessor, U S WEST,⁴ filed a Status Report and Notice of Intent to File with the FCC pursuant to § 271(c) of the Act, which revived the § 271 process in Colorado. On December 7, 1999, the COPUC issued a Procedural Order, which recognized that reasonable alternatives to traditional administrative procedure act (APA) proceedings should be considered, taking input from interested parties and including examples from other states. The COPUC ordered broad notice to all Colorado CLECs and all entities with which U S WEST had executed interconnection agreements. The procedural order also defined, for purposes of Docket No. 97I-198T

⁴ In August 2000, Qwest and U S WEST filed a joint application for COPUC approval of the proposed merger of the two companies, with Qwest continuing as the surviving corporation.

(Docket 198T), the roles of the COPUC, its staff, and COPUC Chairman Raymond L. Gifford, who served as hearing commissioner in the § 271 dockets.⁵

Seven collaborative technical workshops (six on the checklist items and one on the public interest, § 272 and Track A) in Docket 198T developed the terms and conditions of Qwest's SGAT. Qwest, COPUC staff, numerous CLECs, the Colorado Office of Consumer Counsel (OCC), and an independent facilitator (Doherty & Company, Inc.) attended the workshops. The COPUC organized the workshops, which generally met once a month for several days at a time, along different "themes" in the 14-point checklist and the public interest, § 272 and Track A. Impasse issues that emerged from the workshops were briefed by the parties, commented on by staff, and resolved by the hearing commissioner. The hearing commissioner's impasse resolution decision was then subject to motions to modify by the participants. The hearing commissioner answered these motions to modify with a subsequent decision. The full COPUC also reviewed the SGAT in an *en banc* workshop.

The Docket 198T SGAT record thus consists of seven staff workshop reports, 14 decisions by the hearing commissioner on impasse issues (an initial order and an order on motions to modify), and seven final staff workshop reports summarizing the whole of the workshop process. These seven final reports narrate the substance of the workshop, the issues discussed, the issues at impasse, and the hearing commissioner's resolution of those impasse issues. From these reports and through the workshops, the Qwest SGAT took form.

⁵ The COPUC's § 271 process encompassed four dockets: Docket Nos. 97I-198T (the investigation and SGAT proceeding), 99A-577T (the wholesale pricing proceeding), 01I-041T (the Colorado Performance Assurance Plan proceeding), and 02M-260T (the final recommendation docket).

The COPUC also opened Docket No. 99A-577T (Docket 577T) to consider the costing and pricing issues contained in Qwest's SGAT. The COPUC had previously set wholesale prices for U S WEST in Docket No. 96S-331T (Docket 331T), and those prices were nearly four years old. Qwest and CLECs filed cost studies and thousands of pages of accompanying testimony and exhibits. The COPUC treated the cost docket as a traditional state-APA litigated docket, with testimony, cross-examination and closing statements of position. The hearing commissioner presided over a two week hearing in August 2001. Through an Initial Decision and subsequent orders on reconsideration, the COPUC recalibrated Qwest's wholesale rates to TELRIC criteria.

In January 2001, the COPUC opened a third proceeding, Docket No. 01I-041T (Docket 041T), to investigate potential mechanisms for ensuring Qwest's future compliance with § 271. Chairman Gifford served as hearing commissioner, and he appointed Professor Philip J. Weiser⁶ Special Master, with the charge of recommending a performance assurance plan to the COPUC. Over two separate periods spanning 12 months, the Special Master held a series of meetings with representatives of Qwest, CLECs, Commission staff and the OCC. These meetings culminated in two reports, recommending a framework for a performance assurance plan and the rationale underlying it. Parties commented on both reports to the hearing commissioner. The hearing commissioner ultimately adopted the Colorado Performance Assurance Plan (CPAP), adopting the bulk of the Special Master's report, modifying and clarifying other parts of the recommendation. The COPUC subsequently affirmed the decision of the

⁶ Associate Professor of Law and Telecommunications, University of Colorado at Boulder. Before joining the Colorado faculty, Professor Weiser served as senior counsel to the Assistant Attorney General in charge of the Antitrust Division at the United States Department of Justice, where he, among other things, worked on the implementation of Section 271 of the Act..

hearing commissioner. The resulting CPAP is contained as a voluntary amendment to Qwest's SGAT.

In June 1999, the COPUC joined with other member states of the ROC in proposing a collaborative, region-wide test of U S WEST, Inc.'s OSS. The proposal established a process whereby, on a regional basis, states and U S WEST would ensure OSS compliance by independent third-party testing. States did not relinquish their ability to make independent determinations in § 271 filings in each state, and U S WEST was not required to abandon any state-specific advocacy it might choose to make. The COPUC subsequently joined the ROC OSS test as a full participant. The ROC selected KPMG as the independent third-party tester, HPC as the pseudo-CLEC, and Liberty Consulting Group (Liberty) as the performance measure auditor. KPMG issued the ROC OSS Master Test Plan in November 2000, and KPMG's Final OSS Test Report was issued on May 28, 2002.

Finally, in May 2002, the COPUC closed Dockets 041T and 198T and opened Docket Nos. 02M-259T and 02M-260T, with the express purpose of determining and finalizing the COPUC's § 271 recommendation to the FCC.

The COPUC held three *en banc* workshops: one on February 26 to March 1, 2002; one on May 7-9, 2002; and the last on June 10-12, 2002. At these workshops, participants presented witnesses and oral argument concerning the terms of the SGAT; the non-OSS checklist items; the change management process; the public interest; section 272; Track A; the ROC OSS test; Qwest's commercial performance in Colorado; and data reconciliation. On June 13, 2002, at the conclusion of the final *en banc* workshop, the COPUC issued a bench order, which concluded that, subject to a compliance filing

with the COPUC by June 28, it would make an unqualified recommendation of § 271 approval to the FCC. In reaching this conclusion, the COPUC adopted the hearing commissioner's decisions.⁷

The COPUC adhered to open, exhaustive and collaborative processes in the § 271-related dockets. The Docket 198T workshops and the ROC OSS test constituted the epitome of collaborative, open decision making. Docket 041T made innovative use of a Special Master to achieve rough consensus on the CPAP. Docket 577T, meanwhile, was conducted with the traditional formality of ratemaking litigation. All participants in the process had the opportunity to argue and re-argue their respective positions to the hearing commissioner, and then to re-argue those positions yet again to the full COPUC. The COPUC resolved all disputed issues on-the-record, setting forth its rationale in written decisions, and allowed for reconsideration of the same in the event a participant asserted that an error of fact or law had occurred. In sum, the Colorado § 271 record is the product of ample, open proceedings, in which all participants availed themselves of abundant process, and then some.

III. SECTION 271(C)(1)(A) – PRESENCE OF FACILITIES-BASED COMPETITION

Qwest applied to the FCC under § 271(c)(1)(A), Track A.⁸ The COPUC endorses Qwest's Track A compliance.⁹

⁷ See generally, *Section 271 Compliance Order*, App. A.

⁸ 47 U.S.C. § 271(c)(1).

⁹ The discussion that follows is based on workshop testimony and written comments filed with the COPUC in Docket 198T. In its application, Qwest has updated its unbundled loop, UNE-P, collocation, and interconnection trunk information. *Qwest Application* at p. 16. Furthermore, Qwest has adopted a new methodology, counting the listings in the E-911 database, to estimate the number of CLEC access lines in the state. *Qwest Application* at p. 18. Because this evidence was not entered into the Colorado record, the COPUC presents the issues raised and the findings from its own proceedings.

Qwest has demonstrated that it has entered into one or more binding agreements approved under § 252 of the Act. As of June 15, 2002, the COPUC has approved approximately 95 binding wireline interconnection agreements between Qwest f/k/a U S WEST and unaffiliated competing providers of telephone exchange access service.¹⁰ These interconnection agreements provide access and interconnection to competitive providers such as WorldCom, Inc. (WorldCom), AT&T Communications of the Mountain States, Inc. (AT&T), and Sprint Communications Company, L.P. (Sprint). Furthermore, Qwest submitted a comprehensive SGAT that contains terms, conditions, and prices applicable to the provision of all aspects of interconnection, including the 14 checklist items. No party disputes Qwest's evidence with regard to these elements of Track A.

Qwest also showed, through survey evidence and workshop testimony, that unaffiliated competing providers collectively serve more than a *de minimis* number of residential and business customers in Colorado. Major competitive exchange carriers such as AT&T Broadband and WorldCom are providing facilities-based (including UNE-based) access to end-users, in some cases using a combination of their own facilities and UNEs leased from Qwest. According to Qwest, as of March 2001, there were 103,270 unbundled loops in Colorado served by 24 CLECs and 79,406 UNE-Ps served by nine CLECs.¹¹ Qwest estimated the number of bypass lines by adding the number of

¹⁰ As of June 15, 2002, the COPUC also has approved approximately 25 wireless, resale, paging, and EAS interconnection agreements. Eight wireline and five wireless interconnection agreements were awaiting COPUC approval on this date.

¹¹ The COPUC elected not to collect data from CLECs because the available evidence compelled the conclusion "that a sufficient number of residential and business customers are being served by CLECs through the use of their own facilities or in combination with UNEs to demonstrate that there is an actual commercial alternative in Colorado." *Volume 7 Order, Qwest Application*, App. C, Vol. 1, Tab 29.1, at p. 74.

residential white pages listings as of March 2001 to half of the bypass lines ported from Qwest to CLECs, minus the number of stand-alone unbundled loops Qwest provisions to CLEC switches. Under this method, Qwest estimated that there were 78,941 residential facilities bypass lines and 128,570 business facilities bypass lines, which amounted to 11.5 percent of all access lines in Colorado.¹²

AT&T objected to the Qwest methodology. The hearing commissioner found that Qwest's decision to use ported numbers as its estimation base was acceptable "because there is a rational relation between ported numbers and access lines served by CLECs, and Qwest's decision to reduce the total amount of ported numbers by half provides comfort that it is not inflating these figures."¹³ Qwest's decision to account for residential white pages listings also was reasonable because Qwest made an independent showing, through survey evidence and public records, that failure to "add back" residential listings would result in a bypass line estimate far below that which actually exists in the market.¹⁴

In its *Section 271 Compliance Order*, the COPUC summed up the Track A inquiry with the following: "Even if one were to take a pessimistic view of the

¹² By way of comparison, Qwest also multiplied the number of interconnection trunks obtained by CLECs by 2.75 in order to reach a total number of bypass lines in service. This methodology, which was employed by SBC in Kansas, Oklahoma, and Texas, would result in an estimated total of 496,994 competitive bypass lines in July 2001. *See, e.g., SBC Kansas/Oklahoma Order* at ¶ 42, n. 96.

¹³ *Volume 7 Order, Qwest Application*, App. C, Vol. 1, Tab 29.1, at p. 72.

¹⁴ *Id.* at 72. Notably, data recently released by the FCC show that competition in Colorado is robust. The CLEC share, on a percentage basis, of end-user access lines served by reporting carriers has increased from five percent in December 1999 to 10 percent in June 2001. On a percentage basis, the CLEC share is greater than, or equal to, the reported results in Georgia, Louisiana, Kansas, Missouri, New Jersey, Oklahoma, and Rhode Island – all states that have received approval of their section 271 applications. CLECs in Colorado also reported to the FCC that 52 percent of their lines are provided to residential and small business customers - above the national average of 45 percent. *Local Telephone Competition: Status as of June 30, 2001*, Industry Analysis Division, Common Carrier Bureau (Feb. 2002).

calculations performed by Qwest, the method and results comport well with successful applicants.”¹⁵ Qwest meets Track A.

IV. SECTION 271(c)(2)(B) – THE COMPETITIVE CHECKLIST

The COPUC certifies that Qwest complies with the 14-point checklist of § 271(c)(2)(B).

This section presents the COPUC’s assessment of Qwest’s compliance with each of the 14 items in the § 271(c)(2)(B) competitive checklist. In a slight departure from previous state commission evaluations, we treat certain checklist controversies separately. In this section, then, we discuss the full 14 point checklist, briefly describing the positions of Qwest and other parties where necessary and providing a summary of the COPUC’s resolution. Because access to OSS and UNE pricing tend to dominate § 271 scrutiny, we treat those issues in separate sections of this evaluation in sections V and VI, respectively. We also break out change management separately in section VII because of CMP’s prominence as a disputed issue in our record.

No participant raised impasse issues about the following checklist items: Checklist Item No. 7 (911, E-911, directory assistance, and operator services), Checklist Item No. 8 (white pages directory listings), Checklist Item No. 9 (numbering administration), and Checklist Item No. 12 (dialing parity). As such, these checklist items will not be addressed in this section, but we certify compliance with the checklist nonetheless.

¹⁵ *Section 271 Compliance Order*, App. A, at p. 62.

A. Checklist Item No. 1 – Interconnection

Qwest provides interconnection in accordance with the requirements of §§ 251(c)(2) and 252(d)(1) of the Act.¹⁶ During the second collaborative workshop, dedicated to checklist item 1, the participants brought 24 impasse issues to the COPUC for resolution.

Interconnection Trunking. Qwest originally required CLECs to interconnect at each access tandem within a LATA. AT&T, WorldCom, and Sprint objected to this policy, in part, on grounds of efficiency. Noting that the FCC has not specifically addressed the situation in which a BOC has more than one access tandem in a LATA, the hearing commissioner recommended that Qwest modify its SGAT and allow CLECs the option to interconnect at a single point of interconnection.¹⁷

Qwest argued that CLECs should not be allowed to access UNEs through meet-point arrangements. The dispute revolved around the interpretation of paragraph 553 in the FCC's *Local Competition First Report and Order*, which states that a meet point arrangement upon CLEC request "only makes sense for interconnection . . . but not for unbundled access" and later indicates that CLECs should bear the total cost of a meet-point arrangement for unbundled access.¹⁸ The hearing commissioner interpreted the order, consistent with the "necessary and impair" standard of § 251(d)(2), as requiring Qwest to make meet-point trunks available to CLECs only if there is no other feasible UNE access. Qwest was not required to "ratchet down" special access rates to UNE rates in this situation.¹⁹

¹⁶ 47 U.S.C. § 271(c)(2)(B)(i).

¹⁷ See generally *Volume 2A Order, Qwest Application*, App. C, Vol. 1, Tab 10, at pp. 24-26.

¹⁸ 11 F.C.C.R. 15,499 at ¶ 172.

¹⁹ See generally *Volume 2A Order, Qwest Application*, App. C, Vol. 1, Tab 10, at pp. 30-34.

AT&T and WorldCom objected to basing the trunk forecasting deposit requirements in Qwest's SGAT on past forecasting performance.²⁰ In order to address CLEC concerns about having to forecast building needs, the hearing commissioner recommended that Qwest supply terms for both "unforecasted" and "forecasted" offerings.²¹ Deposits are not to be collected until the parties establish contractual liability – however, Qwest is allowed to require a deposit as a form of protection against the overforecasting of trunks.

Collocation. The SGAT contains standard offerings for caged, shared caged, cageless, Interconnection Distribution Frame, remote, common-area splitter, adjacent, and virtual collocation.²² The hearing commissioner recommended that Qwest remove the limitation of physical collocation at remote premises to allow for virtual collocation, and Qwest did so.²³ However, Qwest was not required, in response to a request by Covad, to provide a standard offering for shared cageless collocation under the hearing commissioner's interpretation of 47 C.F.R. § 51.323(k).²⁴

The parties reached impasse on a number of issues regarding forecasting, space reservation fees, provisioning intervals, and limitations on CLEC collocation requests. To Qwest's disappointment, and under the discretion afforded to state commissions under the FCC's *Collocation Waiver Order*,²⁵ the hearing commissioner recommended that Qwest strike collocation forecasting requirements and associated provisioning intervals

²⁰ See SGAT § 7.2.2.8.6.

²¹ See generally *Volume 2A Order, Qwest Application*, App. C, Vol. 1, Tab 10, at pp. 34-40; *Motion to Modify Volume 2A Order, Qwest Application*, App. C, Vol. 1, Tab 16, at pp. 4-6.

²² *Qwest Application* at p. 33.

²³ *Volume 2A Order, Qwest Application*, App. C, Vol. 1, Tab 10, at pp. 55-59.

²⁴ *Id.* at pp. 52-55.

²⁵ See also 47 C.F.R. § 51.323(1).

from its SGAT.²⁶ The parties reached a compromise on exceptions to the FCC's 90-day default interval for provisioning, allowing for an additional 60 days when Qwest lacks the necessary space, power, or HVAC to provide collocation. Additionally, Qwest must meet the 90-day interval for the first five collocation applications filed per CLEC per week, with any additional applications resulting in negotiated intervals not to exceed 150 days.²⁷ Finally, the hearing commissioner recommended that Qwest replace its space reservation fee of a pro-rated forfeiture fee (up to 25 percent of the construction cost) with a flat, non-refundable fee of \$200 to cover its administrative costs.²⁸

Thus, through the collaborative workshop and impasse issue resolution, and Qwest accession to the impasse issue resolution, the COPUC concluded that the SGAT contains terms compliant with checklist item 1.

B. Checklist Item No. 2 – Access to Unbundled Network Elements

Qwest demonstrated that it provides nondiscriminatory access to network elements consistent with the requirements set forth in §§ 251(c)(3) and 252(d)(1) of the Act and the FCC's rules. CLECs may access the following unbundled network elements at any technically feasible point in Qwest's network: local loops, subloops, network interface devices (NIDs), local and tandem switching, local transport, dark fiber, signaling and call-related databases, and OSS.²⁹

Several "general" UNE access issues are highlighted here. First, AT&T sought to extend state retail service quality requirements to UNEs. The COPUC denied this

²⁶ See generally *Volume 2A Order, Qwest Application*, App. C, Vol. 1, Tab 10, at pp. 66-72; *Motion to Modify Volume 2A Order, Qwest Application*, App. C, Vol. 1, Tab 16, at pp. 7-8.

²⁷ See generally *Volume 2A Order, Qwest Application*, App. C, Vol. 1, Tab 10, at pp. 73-76.

²⁸ *Id.* at pp. 81-88.

²⁹ The following items are addressed elsewhere in this evaluation. See Section IV(D) (unbundled loops, subloops, NIDs, line-sharing and line-splitting); Section IV(E) (transport and dark fiber); Section IV(F) (switching); Section IV(G) (call databases and signaling); and Section VI (OSS).

request.³⁰ CLECs have the option of resale if they wish to be protected by state retail service quality rules and, as an ancillary matter, CLECs who opt into the CPAP will receive adequate compensation should Qwest's wholesale performance miss the mark.

The question of whether Qwest is required to construct UNEs (excluding interoffice facilities) for CLECs arose on several occasions. Qwest argued that CLECs may access UNEs in Qwest's existing network, but ILECs are not obligated to build, in essence, a network for CLECs. AT&T equated an ILEC's obligation to build with its obligation to maintain, repair, or replace UNEs under the FCC's *Local Competition First Report and Order*. The hearing commissioner resolved the issue in Qwest's favor, stating that "Qwest should not be required in all instances to expend the resources in time and manpower, at an opportunity cost to itself, to build new facilities for competitors who have the option of constructing those facilities at comparable costs."³¹ However, to address situations in which Qwest rejects a CLEC request to build and then constructs a facility for its own customers, Qwest was required to insert language into its SGAT that requires Qwest "to assess whether to build for CLECs in the same manner that it assesses whether to build for itself."³² WorldCom later argued that the fill factor assumptions for UNE rates contemplates the construction of new facilities for CLECs.³³ The cost studies considered by the COPUC evaluated fill factors for a replacement network and do not contemplate reimbursement for the construction of new CLEC facilities.

Finally, Qwest maintained that the FCC's commingling prohibition for tariffed special access services extends to all UNEs. The hearing commissioner attempted to

³⁰ See generally *Volume 4A Order, Qwest Application*, App. C, Vol. 1, Tab 7, at pp. 4-7.

³¹ *Id.* at p. 9.

³² *Id.* at p. 10.

³³ See *Volume 6A Order, Qwest Application*, App. C, Vol. 1, Tab 27, at p. 24.

square the contradictory language in the FCC's *Supplemental Order and Clarification* and *Public Notice*³⁴ with the Act's policy against restrictions on the use of UNEs, and he found that the prohibition applies only to loop and loop-transport combinations.³⁵ Qwest subsequently modified its SGAT to state that UNEs may be connected to what Qwest calls "finished services" unless it is expressly prohibited by existing rules.

With these, and related impasse issues resolved, and the majority of the terms and conditions established through the collaborative workshop, the COPUC concluded that the SGAT complies with checklist item 2.

C. Checklist Item No. 3 – Access to Poles, Ducts, Conduits, and Rights-of-Way

Qwest demonstrated that it provides reasonable and nondiscriminatory access to its poles, ducts, conduits and rights-of-way.³⁶ One impasse issue is worth noting here. The SGAT originally contained reciprocal access provisions regarding ducts, poles, and rights-of-way. AT&T and WorldCom argued that only CLECs are entitled to reciprocal access under 47 C.F.R. §§ 51.219, 1.1403(a) and 1.402(h). Finding the plain language of § 251(b)(4) and § 224 of the Act to be contradictory, the hearing commissioner preliminarily concluded that the FCC's reliance on § 224 (which excludes ILECs from the definition of a "telecommunications carrier") in its implementing regulations to mean that reciprocal access need not be granted to ILECs.³⁷ Further buttressing this conclusion are the policy considerations behind the Act itself, which afford CLECs with access to

³⁴ *Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Services*, CC Docket No. 96-98, Public Notice (rel. Jan. 24, 2001).

³⁵ See generally *Volume 4A Order, Qwest Application*, App. C, Vol. 1, Tab 7, at pp. 20-22.

³⁶ 47 U.S.C. § 271(c)(2)(B)(iii).

³⁷ See generally *Volume 1A Order, Qwest Application*, App. C, Vol. 1, Tab 3, at pp. 4-10.

ILEC property as a way to “prime the competitive pump” - on an interim basis. Qwest struck the offending language from its SGAT.

By resolving this impasse issue, and through the collaborative workshop process, the COPUC concludes that Qwest’s SGAT complies with checklist item 3.

D. Checklist Item No. 4 – Unbundled Local Loops

Qwest offers “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”³⁸ Unsurprisingly, the participants to the § 271 proceedings and Staff expended a tremendous amount of time and energy focusing on topics encompassed by this checklist item. Prominent issues are evaluated in turn.

Loops. CLECs challenged the sufficiency of Qwest’s modified raw loop data tool (RLDT). AT&T sought access to Qwest’s loop facilities administration and customer service system (LFACS) database, which Qwest claimed contains confidential loop information about the unbundled loops in use by Qwest and CLECs, and which does not contain a search function. Qwest said that parity of information that is used by Qwest employees in the pre-ordering process is all that is required by § 271. AT&T and Covad Communications Company (Covad) pressed for a higher standard. In ¶ 427 of the *UNE Remand Order*, the FCC has suggested that a standard higher than parity is required because ILECs must “provide requesting carriers the same underlying information that the incumbent LEC has in any one of its own databases or other internal records.” The hearing commissioner concluded that, because Qwest’s most recent raw loop data tool had only been recently released, it was impossible to determine whether the RLDT

³⁸ 47 U.S.C. § 271(c)(2)(B)(iv).

contained the information to which CLECs are entitled under the *UNE Remand Order*. The hearing commissioner further suggested that Qwest's performance under this issue was properly being measured by the ROC OSS test.³⁹

In the final *en banc* workshops, the COPUC reexamined the issue and ordered Qwest to make minor modifications to the SGAT with language proposed by AT&T. Under SGAT § 9.2.2.8, CLECs have the option of requesting a manual look-up of Qwest's records, back office systems, and databases where loop make-up information resides. Qwest will then update the LFACs database with the requested information, which will populate loop qualification tools like the RLDT.

Subloops. AT&T objected to the necessity of submitting a local service request (LSR) for on-premises wiring when a number is not ported. Instead, AT&T proposed that CLECs submit a statement every month (or less), which would specify the cable and pair employed by the CLEC and the address of the Multi Tenant Environment. In agreement with the multistate facilitator's resolution on this point, the hearing commissioner found that LSRs are the most efficient way to provide Qwest with the information it needs for billing and maintenance.

NIDs. The hearing commissioner agreed with AT&T and recommended that Qwest allow CLECs stand-alone access to the NID, regardless of whether Qwest owns the inside wire.⁴⁰ Because of the complex and arcane nature of the impasse issue, the hearing commissioner left open that actual commercial experience with NID access would inform the COPUC whether additional changes to the SGAT are necessary.

³⁹ See generally *Motion to Modify 5A Order, Qwest Application*, App. C, Vol. 1, Tab 26, at pp. 6-8.

⁴⁰ See generally *Volume 5A Order, Qwest Application*, App. C, Tab 19, at pp. 14-17.

Line-sharing/Line-splitting. Qwest modified its SGAT to reflect that it will provide line-sharing wherever it is technically feasible. However, the hearing commissioner found that the determination of whether line-sharing over fiber is technically feasible properly lies before the FCC.⁴¹

Covad expressed concerns about Qwest's ability to provision line-sharing orders and requested that Qwest personnel perform a data continuity test with Covad-supplied equipment. The parties reached consensus SGAT language in the Washington proceedings and agreed to incorporate it into Qwest's SGAT in Colorado. Qwest will perform tests as part of its basic installation process and in response to trouble tickets initiated by CLECs.⁴²

With regard to line-splitting, one issue concerned the extent of Qwest's line-splitting obligations. Qwest offers line-splitting over UNE-P in addition to a product that it calls "loop-splitting." AT&T wanted Qwest to revise its SGAT to state that it will provide line-splitting on all loop and loop combinations, including enhanced extended loop (EEL)-splitting. The hearing commissioner found that the SGAT as written ensures access to technically feasible line-splitting arrangements, noting that the vast majority of these arrangements are over UNE-P. The hearing commissioner found that use of a special request process for EEL-splitting, a product for which there is little or no demand, is wholly reasonable. Finally, Covad argued that Qwest be required to provide line-splitting over fiber – again, an issue that is being properly considered by the FCC.

⁴¹ See generally *Volume 3A Order, Qwest Application*, App. C, Vol. 1, Tab 13, at pp. 23-26.

⁴² SGAT §§ 9.4.4.1.4.1, 9.4.6.3.3.

The hearing commissioner declined to expand Qwest's obligations by providing CLEC access to its splitters on a line-at-a-time basis.⁴³ The FCC has readdressed this issue in the *SBC Arkansas/Missouri Order* and concluded that "incumbent LECs have no obligation to provide splitters to competitive LECs that obtain voice services on the same line from a competing carrier."⁴⁴

After resolving these and other impasse issues, and through the collaborative workshop processes, the COPUC concludes that Qwest's SGAT complies with checklist item 4.

E. Checklist Item No. 5 – Unbundled Local Transport and Dark Fiber

Qwest provides shared, dedicated, and dark fiber transport in compliance with the Act. Qwest previously made a pricing distinction between unbundled dedicated interoffice transport (UDIT) on a distance-sensitive rate, and extended unbundled dedicated transport (EUDIT) on a flat rate. The hearing commissioner recommended that Qwest eliminate the distinction and base dedicated transport rates on their true, or distance-sensitive, cost.⁴⁵ The hearing commissioner rejected AT&T's assertions that Qwest is required to provide the electronics on a CLEC's end of dedicated transport and attach electronics to dark fiber as an attempt to impose an obligation to build on Qwest.⁴⁶

The hearing commissioner further allowed Qwest to apply the FCC's EEL restriction to dark fiber, which requires interexchange carriers to provide a "significant amount of local exchange [traffic]" in order to convert special access services to unbundled loop and transport combinations. Dark fiber, as the FCC has stated, can make

⁴³ *Volume 6A Order, Qwest Application*, App. C, Vol. 1, Tab 27, at pp. 4-5.

⁴⁴ *SBC Arkansas/Missouri Order* at ¶ 106.

⁴⁵ *See generally Volume 4A Order, Qwest Application*, App. C, Vol. 1, Tab 7, at pp. 24-27.

⁴⁶ *Id.* at pp. 11-12, 27.

up both an unbundled loop and unbundled dedicated transport, and the EEL restriction applies to combinations of loop and transport.⁴⁷

This and other impasse issues being resolved, and the remainder of checklist 5 terms being decided by collaboration, the COPUC concludes the SGAT satisfies checklist item 5.

F. Checklist Item No. 6 – Unbundled Local Switching

Qwest demonstrated that it provides nondiscriminatory access to unbundled switching. Six impasse issues emerged from the collaborative workshops with regard to this checklist item.

Two impasse issues focused on the FCC's unbundled switching exemption in Density Zone 1. First, the hearing commissioner recommended that Qwest modify its SGAT to reflect that the exemption does not apply when EELs are not available due to space or capacity limitations.⁴⁸ Second, the hearing commissioner decided that a customer's access lines within Zone 1 should be counted on a wire center basis.⁴⁹

With regard to unbundled packet switching, Qwest incorporated the FCC's four-part test into its SGAT.⁵⁰ AT&T, Covad and Sprint asked the COPUC, in essence, to expand the FCC's unbundling requirements. For example, AT&T and Covad argued that CLECs should be allowed access to unbundled packet switching when it is "economically infeasible" to remotely deploy digital subscriber line access multiplexers (DSLAMs).⁵¹ The hearing commissioner rejected this. Another impasse issue raised the question of whether CLECs should be allowed to circumvent the FCC's requirements and place their

⁴⁷ *Supplemental Order and Clarification* at ¶¶ 174, 325.

⁴⁸ *See generally Volume 4A Order, Qwest Application*, App. C, Vol. 1, Tab 7, at pp. 37-40.

⁴⁹ *Id.* at pp. 41-43.

⁵⁰ SGAT § 9.20.2.1.

line cards in a remotely deployed DSLAM.⁵² Noting that the CLECs were confusing “the goal of creating a competitive telecommunications market with creating a telecommunications market with competitors in it,” the hearing commissioner declined to exercise the COPUC’s authority to expand Qwest’s unbundling obligations.⁵³ The economies of scale and scope that Qwest might enjoy in bundling services with digital subscriber line (DSL) are mitigated by the availability of UNE-P and resale in the Act.

After resolving these issues, and through the collaborative workshop process, the COPUC concluded that the SGAT complies with checklist item 6.

G. Checklist Item No. 10 – Databases and Associated Signaling

Qwest provides nondiscriminatory access to databases and associated signaling necessary for call routing and completion.⁵⁴ As a result of the collaborative workshops, only one impasse issue was brought to the COPUC for consideration. AT&T and WorldCom sought “global” access to Qwest’s Calling Name Assistance Database (CNAM) or Inter-Network Calling Name Assistance Database (ICNAM). Qwest’s SGAT allowed only for access on a “per query” basis.⁵⁵ The hearing commissioner declined to treat the CNAM/ICNAM database as a UNE, citing the FCC’s rules as requiring access only “at the signaling transfer point linked to the unbundled databases.”⁵⁶ Moreover, the *UNE Remand Order* provides further support for per query access, stating that “the cost incurred by a requesting carrier to self-provision or use

⁵¹ See generally *Volume 3A Order, Qwest Application*, Vol. 1, Tab 13, at pp. 13-15.

⁵² *Id.* at pp. 15-18.

⁵³ *Id.* at p. 14.

⁵⁴ 47 U.S.C. § 271(c)(2)(B)(x).

⁵⁵ SGAT § 9.17.

⁵⁶ *Volume 1A Order, Qwest Application*, App. C, Vol. 1, Tab 3, at 15, citing 47 C.F.R. § 51.319(e)(2)(i).

alternative databases does not appear to materially diminish the carrier's ability to provide the services it seeks to offer."⁵⁷

By concluding Qwest is not obligated to provide complete access to the CNAM database, and through the collaborative workshop process, the COPUC concludes that Qwest's SGAT complies with checklist item 10.

H. Checklist Item No. 11 – Number Portability

Qwest complies with the number portability regulations the FCC has adopted pursuant to § 251 of the Act.⁵⁸ Only one impasse issue -- coordination of conversions -- was brought to the COPUC's attention. Qwest revised its SGAT to reflect that it will not disconnect a customer's service until 24 hours after the advanced intelligent network (AIN) trigger is set (*i.e.*, the day before the scheduled port date).⁵⁹ A CLEC has until 8:00 P.M. on the scheduled port date to change or cancel a scheduled disconnection via a supplemental LSR. The SGAT also contains provisions for late notification after 8:00 P.M. The hearing commissioner rejected AT&T's request that Qwest undertake a study of low-cost, fully automated conversion processes, finding that the procedures implemented by Qwest reasonably safeguard against customer service outages.

After resolving this issue, and the remaining issues under number portability agreed-to through workshop consensus, the COPUC concludes that Qwest's SGAT complies with checklist item 11.

⁵⁷ *UNE Remand Order* at ¶ 415.

⁵⁸ 47 U.S.C. § 271(c)(2)(B)(xi).

⁵⁹ SGAT § 10.2.5.3.1.

I. Checklist Item No. 13 – Reciprocal Compensation

Qwest is providing reciprocal compensation in accordance with the requirements of § 252(d)(2) of the Act and the FCC's rules.⁶⁰

Two reciprocal compensation impasse issues are highlighted here. The first asked the COPUC to decide whether Qwest could require non-TELRIC prices for the local traffic portion of a private line facility.⁶¹ The hearing commissioner found that the TELRIC-based alternative to CLECs, interconnection through "entrance facilities," is sufficient to satisfy § 271.⁶² Several additional factors (such as the FCC's reluctance to allow commingling at different rates, the potential for under-compensation to Qwest, and the impact on universal service subsidies) provided further support for this conclusion.

AT&T and WorldCom further argued that CLECs should not be required to pay for transport between remote offices and host offices. Staff concluded that the host-remote link is properly classified as interoffice trunking, and the hearing commissioner agreed. The COPUC noted that CLECs have the option to avoid transport charges through collocation at the remote switch.

The resolution of these impasse issues and the agreements reached during the collaborative workshop process lead the COPUC to conclude that Qwest's SGAT complies with checklist item 13.

J. Checklist Item No. 14 – Resale

Qwest demonstrated that it offers for resale at wholesale rates and on a reasonable and nondiscriminatory basis any telecommunications service that it provides at retail to

⁶⁰ 47 U.S.C. § 271(c)(2)(B)(xiii).

⁶¹ See SGAT § 7.3.1.1.2.

⁶² See generally *Volume 1A Order, Qwest Application*, App. C, Vol. 1, Tab 3, at pp. 18-21.

its end-user customers.⁶³ The COPUC has established the wholesale rate for resale by reducing retail costs from Qwest's existing retail rate. The only major impasse issue – application of service credits and penalties to resold services – was resolved in Qwest's favor.⁶⁴ Under SGAT § 6.2.3.1(a), service credits to CLECs shall be made at the wholesale discount. This resolution and the agreements reached in the collaborative workshop process lead the COPUC to conclude that Qwest's SGAT is compliant with checklist item 14.

K. SGAT Compliance with Competitive Checklist

This retelling of bringing Qwest's SGAT into compliance with the 14-point competitive checklist only begins to touch on the volume and breadth of issues that arose in Colorado's six SGAT workshops. For a more thorough view of the consensus issues, the impasse issues, the resolution of the impasse issues and the final SGAT terms, the COPUC directs the FCC to the six volumes of COPUC staff reports on workshops, hearing commissioner orders on impasse issues and motions to modify, the COPUC's decisions from the *en banc* workshops, and finally the Qwest SGAT itself.⁶⁵ The six staff reports on the SGAT workshops, in particular, provide a comprehensive summary of the record and the reasoning behind the COPUC's resolution of the impasse issues.

After evaluating these six staff workshop reports and the enormous record behind these reports, the COPUC concluded Qwest's SGAT complies with the 14-point checklist.⁶⁶ We urge the FCC to conclude the same.

⁶³ 47 U.S.C. § 271(c)(2)(B)(xiv).

⁶⁴ See generally *Volume 2A Order*, *Qwest Application*, App. C, Vol. 1, Tab 10, at pp. 90-96.

⁶⁵ See generally, *Qwest Application*, App. K, Vol. 1, Tabs 725, 1066, 1127, 1150, 1222, 1224 and 1241.

V. PRICING

The Act requires that prices for interconnection and unbundling be “based on cost” and “nondiscriminatory.”⁶⁷ The FCC has expanded on the statutory criteria, decreeing that interconnection and unbundling be priced according to the TELRIC methodology, plus a reasonable allocation of joint and common costs (TELRIC Plus).⁶⁸

Any examination of pricing must take place with the context of Colorado’s unique topography in mind. Colorado is a state that is unparalleled in its geographical diversity. Except for small cities and towns in river valleys and mountain basins, most of western Colorado is sparsely populated. Eastern Colorado, which is also characterized by low population density, has flat, treeless plains that extend from the Rocky Mountains to the Nebraska and Kansas state lines. The region in central Colorado, commonly called the Front Range, runs from north to south in the plains and foothills just east of the Rocky Mountains, and contains the Denver metropolitan area, Colorado Springs, and other communities such as Boulder. In comparison to other parts of the state, population density along the Front Range is dramatically higher.

Colorado’s topography cautions against a rote “stare and compare” approach to the rates established in Colorado *vis-à-vis* states in other service territories that have already received § 271 approval. For example, the statewide average \$15.85 unbundled loop rate is higher in Colorado than it is in New York, and with good reason. While placement costs may be similar to other states in densely populated areas of Colorado, costs will vary widely across the state for other population density zones as compared to other states. For example, on the eastern plains, the cost of placing cable by plowing is

⁶⁶ See generally, *SGAT Compliance Order*.

⁶⁷ 47 U.S.C. § 252(d)(1)(A)(i) and (ii).

fairly reasonable due to the good soil conditions. Near the mountains, costs begin to increase significantly as the terrain becomes rocky. In many areas of the Rocky Mountains, placing cable by plowing is virtually impossible. While the cost models may attempt to capture such soil condition effects, the models are still not sophisticated enough to capture the effects of narrow rights-of-way when placement is required along narrow canyon roads, or the unexpected costs of boring through granite.

Furthermore, the COPUC has issued decisions regarding its preference for the use of buried plant in rural areas. The COPUC authorized for Mountain Bell (Qwest's predecessor) a special accelerated revenue recovery mechanism to place loop and interoffice plant underground where it had previously been strung along pole lines. The COPUC made this decision based upon the severe climactic factors occurring in this state, such as intense wind, ice, severe snow, and high lightning levels.

We offer this lesson in Colorado's topography and weather conditions for a directed purpose. The COPUC completed a fully litigated rate case, Docket 577T, in advance of this § 271 application filing. The new TELRIC rates derived there, we believe, are soundly reasoned conclusions using our particular knowledge and expertise of Colorado's conditions. To be sure, certain UNE rates are not place-dependent. But many are. As the FCC evaluates our rates, be assured that the COPUC sedulously adhered to the TELRIC methodology in deriving those rates and exercised its best-informed ratemaking discretion in determining the inputs that would govern the cost model outputs.

⁶⁸ 47 C.F.R. § 51.501.

Much has been made in the pricing proceedings and in Qwest's application about prices falling in the "low end of the reasonable TELRIC range."⁶⁹ While there has been a substantial reduction in rates that were established over four years ago in the COPUC's previous wholesale pricing proceeding, Docket 331T, the COPUC has not pursued pricing with a blanket "lower is better" philosophy. Put simply, lower UNE prices are not an unalloyed good. Creating a presumption toward consistently lower prices is neither consistent with TELRIC nor sound competition policy.

As the FCC is no doubt aware, the TELRIC pricing methodology is an extraordinarily complex analytic undertaking. Recognizing that it may serve as a benchmark for the other states in Qwest's region, the COPUC has taken its rate setting mandate very seriously. The COPUC's pricing docket was premised on the notion that, so long as a price set by the COPUC falls within the TELRIC range of reasonableness, that price will satisfy the FCC's pricing guidelines.⁷⁰ In order to reach this result, the COPUC focused its hearings on three things: (1) the relative merits and transparency of the cost models presented by the parties; (2) the reasonableness of the assumptions underlying the cost models; and (3) whether the cost models give outputs that yield plausible, real world, TELRIC prices.⁷¹

Qwest submitted a number of stand-alone cost models to generate UNE pricing and TELRIC studies to support over four hundred proposed wholesale rates, including (but not limited to) a Loop Module (LoopMod), a Network Access Switch Channel to generate investment costs for high capacity DS1 and DS3 loops, and a switching module.

⁶⁹ See, e.g., *Qwest Application* at p. 155.

⁷⁰ *Commission Order (Decision No. C01-1302), Qwest Application*, App. C, Vol. 2, Tab 10, at p. 12.

⁷¹ *Id.* at p. 14.

AT&T, WorldCom, and XO Colorado, Inc. (XO) offered HAI Model 5.2a into evidence as producing TELRIC-compliant recurring prices for the components of UNE-P. AT&T and WorldCom also jointly submitted a Nonrecurring Cost Model.

Although the COPUC found that both Qwest's LoopMod and the HAI model were acceptable, the COPUC elected to rely on the HAI Model because, as compared to the LoopMod, it uses actual customer locations to the greatest extent possible.⁷² The COPUC then determined the appropriate input assumptions for values such as drop lengths, placement costs, fill factors, plant mix, and line counts.⁷³ Finally, capital and expense factors were scrutinized.⁷⁴

As addressed below, rate elements of note from Docket 577T include: (1) analog loops; (2) switching; (3) UNE non-recurring charges; (4) high capacity loops; and (5) the high frequency portion of the loop used in line-sharing.

A. Analog Loops

Qwest argued that the previously adopted statewide average loop rate of \$20.65 should be maintained. AT&T claimed that the rate did not reflect Qwest's forward-looking costs and pointed to other states in the Qwest region as having lower average rates despite lower population density. The COPUC established a new effective

⁷² See *id.* at pp. 34-40. LoopMod was also used for the limited purpose of a "secondary check" on the outputs of the HAI model. *Ruling on Applications for RRR (Decision No. C02-409)*, *Qwest Application*, App. C, Vol. 2, Tab 11, at pp. 24-27.

⁷³ *Commission Order (Decision No. C01-1302)*, *Qwest Application*, App. C, Vol. 2, Tab 10, at pp. 40-57; *Ruling on Applications for RRR (Decision No. C02-409)*, *Qwest Application*, App. C, Vol. 2, Tab 11, at pp. 28-47; *Decision on Applications for RRR (Decision No. C02-636)*, *Qwest Application*, App. P, Vol. 1, Tab 12, at pp. 4-10.

⁷⁴ *Commission Order (Decision No. C01-1302)*, *Qwest Application*, App. C, Vol. 2, Tab 10, at pp. 57-74; *Ruling on Applications for RRR (Decision No. C02-409)*, *Qwest Application*, App. C, Vol. 2, Tab 11, at pp. 47-50.

statewide average rate of \$15.85. All parties supported deaveraging, and the COPUC originally priced the unbundled loop on a wire center basis in three rate groups.⁷⁵

The federal and Colorado high cost mechanisms have traditionally provided targeted support to high cost loops through zones established within each wire center. Under the originally-adopted deaveraging plan, which established three groups of wire centers, these high cost zones would be eliminated, making a calculation of high cost support difficult. After expressing its concern about the high cost mechanisms in its original order, on reconsideration the COPUC sought to square the deaveraging plan with these mechanisms by establishing interim rates for each wire center in the state (166 total) based on the number of access lines in each center, subject to deaveraging proposals in Phase 2.⁷⁶ The interim rates would also allow for high cost support to port from Qwest to CLECs.

Qwest argued against the interim rates, claiming that currently available OSS would not be able to simultaneously implement deaveraging on both a mileage-based and a wire center basis. Finding that three rate groups are, at least in the interim, familiar to the carriers, the COPUC adopted Qwest's proposed rate groups.⁷⁷ These effective interim rates are subject to deaveraging proposals in Phase 2 of the cost docket. The interim rates are currently \$5.91 for Zone One, \$12.31 for Zone Two, and \$32.74 for Zone Three. By way of comparison, Colorado's statewide average loop rate of \$15.85 is

⁷⁵ *Commission Order (Decision No. C01-1302), Qwest Application*, App. C, Vol. 2, at pp. 24-26 and Attachment A.

⁷⁶ *Ruling on Applications for RRR (Decision No. C01-1302), Qwest Application*, App. C, Vol. 2, Tab 11, at pp. 57-60 and Attachment B. The COPUC will conduct a second phase in Docket 577T to review wholesale rates that are, at present, interim. In this regard, it is important to note that the COPUC has approved the wholesale rates, both permanent and interim, contained in Exhibit A to Qwest's SGAT.

⁷⁷ *Decision on Applications for RRR (Decision No. C02-636), Qwest Application*, App. P, Vol. 1, Tab 12, at pp. 12-15.

in line with several of Qwest's other large states – Minnesota (\$17.87), Oregon (\$15.00), and Washington (\$17.59).⁷⁸

B. Switching

The record in Docket 577T was insufficient to justify revision of the switching rates from Docket 331T, and further proceedings were deferred to Phase 2. AT&T and XO objected, and Qwest responded by suggesting interim compromise rates for the recurring usage-based and recurring port components. The COPUC adopted those rates on an interim basis, subject to reexamination in Phase 2.

AT&T and XO once again asked for reconsideration of the switching rates in conformity with an HAI model run with COPUC-adopted inputs. To expedite the proceeding, Qwest offered to make further reductions to the interim rates for usage-based and recurring port components, requested that the COPUC adopt AT&T and XO's proposed recurring rate levels for tandem switching, and proposed rates *lower* than AT&T and XO's proposal for shared transport. The effective interim rates, as adopted by the COPUC pending reexamination in Phase 2, include a usage-sensitive element of \$0.00161 per minute and a non-usage-sensitive line port of \$1.53 per month. Qwest's rate for tandem switching comports with the AT&T/XO proposal of \$0.00069 per minute, and Qwest trumped AT&T/XO's proposal for shared transport with a rate of \$0.00111 per minute. No party raised objections to the revised rates when afforded the opportunity to do so.

⁷⁸ Anna-Maria Kovacs, Commerce Capital Markets, *The Status of 271 and UNE-Platform in the Regional Bells' Territories* (Apr. 15, 2002).

C. UNE Non-Recurring Charges

In its initial decision, the COPUC came close to adopting Qwest's non-recurring rates *in toto*. AT&T argued against the COPUC's exclusive use of assumptions presented by Qwest in its non-recurring cost model. AT&T presented substantial evidence that non-recurring charges were above the TELRIC range of reasonableness, in light of non-recurring charges adopted in states that have received § 271 approval. Thus, on reconsideration, the COPUC agreed with AT&T, in part, and adjusted a number of inputs to assume that more non-recurring activities will take place through electronic processing. The new rates better reflect the efficiencies that will be realized in a forward-looking network. For instance, the non-recurring rate for a hot cut was reduced from \$94.78 to \$59.81.

While the COPUC's determinations on reconsideration did not fully satisfy AT&T's desires for non-recurring rates, Colorado's non-recurring rates reflect an informed judgment as to an efficient-Qwest's actual forward-looking non-recurring costs. The COPUC exercised its best-informed ratemaking judgment in setting these rates and concluded they fall within the TELRIC range of reasonableness. To be sure, we anticipate that the FCC will be hearing – as we did—that these rates are too high to be TELRIC. However, we believe our decisions on cost model inputs are defensible and based on real world forward-looking assumptions.

It is no doubt possible to input a different set of assumptions into the cost models to plunge the non-recurring rates downward. Such assumptions are fallacious for two reasons: one, they ignore the inter-relation between recurring and non-recurring charges. Ultra-low non-recurring cost assumptions, more often than not, offload and amortize

what would otherwise be non-recurring costs into the recurring costs. We chose not to do that. Two, assumptions that yield dramatically low non-recurring costs abjure real world forward-looking assumptions of an efficient carrier and, instead, use “pie in the sky” assumptions about the forward-looking cost inputs experienced by a carrier. We likewise chose not to do that.

The COPUC concluded that the only way to justify cost assumptions such as those propounded by certain CLECs was to shroud a CLEC-welfare-friendly industrial policy behind the rhetoric of TELRIC. To condone such conclusions would be objectionable for two reasons: one, it would be at the expense of Qwest, forcing it to cross-subsidize CLEC-entry with below-cost non-recurring rates; and, two, it would do violence to TELRIC, a methodology that allows for a range of reasonableness, but one that should not be used to smuggle in cross-subsidization policies of the telecom past.

D. High Capacity Loops

The COPUC has taken an aggressive approach in setting TELRIC-compliant recurring rates for high capacity loops. The COPUC strongly believes that facilities-based competition will best be promoted whenever CLECs are encouraged to “fill in the gaps.” Accordingly, the TELRIC-based rates for high capacity loops generally come in at the lower end of the FCC’s range of reasonableness. It is hoped that such rate-setting will accommodate CLEC-entry strategies that are facilities-based in the long-term, balancing the desire for more immediate entry against the fear of creating disincentive for facilities-based entry with rates that are too low.

E. Line-sharing

Covad and Sprint argued that the high frequency portion of the loop (HFPL) used in line-sharing should be priced at zero. Despite Qwest's offer to reduce the recurring HFPL rate to zero on an interim basis, the COPUC relied on a privately negotiated rate of \$4.89 from a Qwest Line-sharing Agreement, which was a price agreed to under the negotiation/arbitration provisions in § 252 of the Act. In its application, Qwest has chosen to "comply with the [COPUC's] mandate in this regard."⁷⁹

The rationale for pricing the HFPL at a positive cost is explored in Qwest's application but bears repeating here. Because the COPUC did not establish the HFPL rate through a cost study, Covad claimed that the decision violates the FCC's requirement that UNE prices be cost-based. The COPUC respectfully disagrees. A number of services are provided over the loop, and on a forward-looking basis, each service contributes to cost causation. The FCC's TELRIC pricing rules require a reasonable allocation of joint and common costs.⁸⁰ And, even where the incremental cost of a service is zero, economic theory suggests that a positive price is required where there is a positive demand for that service. As such, a zero price indulges a fallacy that all prices — even for joint and common products — should be set at incremental cost.⁸¹

⁷⁹ *Qwest Application* at p. 162.

⁸⁰ 47 C.F.R. 51.505(a) and (c). Furthermore, COPUC Costing and Pricing Rule 4 CCR 723-30-4.2(a)(iv) requires that all services which use the loop contribute to its cost recovery.

⁸¹ The COPUC dallied with what might be the closest to the economically efficient answer; namely, a Ramsay pricing solution using the relative demand elasticities of the respective products, HFPL and voice grade loop. The COPUC speculates that such a Ramsay solution would lead to the lion's share of loop cost being recovered from the voice grade portion of the line, but also notes that the dynamism of the market and a sudden shift in demand for HFPL-based broadband might flip this equation. *Decision on Applications for RRR*, (Decision No. C02-636), *Qwest Application*, App. P, Vol. 1, Tab 12. Our record in Docket 577T was bereft of any evidence suggesting such a solution, in any event.

Adoption of Covad and Sprint's proposed rate would also have the inevitable and "unintended" result of creating a regulatory arbitrage opportunity. Pricing the HFPL at zero would send a misleading price signal to actual and potential high-speed cable and wireless providers and, in turn, to consumers. Of course, the costs and benefits would run in exactly the opposite direction if the price were set too high. In either case, the consumer loses. But here, the COPUC has compelling evidence of a private solution that falls well within the range of reasonableness, is forward-looking, and cost-based. Pareto optimal transactions are not easily cast aside.

In summary, the COPUC has worked to ensure that its rates for unbundled network elements are TELRIC-compliant when examined from the bottom up. Prices in effect for resale, interconnection, and unbundled network elements comport with the FCC's requirements. We anticipate some carping about the prices ordered in our cost docket and direct the FCC to our respective pricing orders for fuller accounts of our reasoning. In this evaluation, we will conclude by certifying that we followed the TELRIC methodology to the best of our ability.

VI. ACCESS TO OPERATIONAL SUPPORT SYSTEMS

Qwest provides CLECs with just, reasonable, and nondiscriminatory access to its systems, databases and personnel – collectively referred to as "OSS" – in accordance with the Act and FCC rules. The ROC OSS test was designed to determine whether Qwest meets the FCC's requirements. Of 711 criteria evaluated by the test, KPMG and HPC determined that 645 were "satisfied" by Qwest's OSS. HPC determined that 3 criteria were "not applicable." KPMG found that 11 criteria were "not satisfied" and was

“unable to determine” whether an additional 25 criteria were met. The remaining 27 criteria were diagnostic measures. This section primarily focuses on those criteria which did not result in a satisfactory finding by KPMG and are considered by the COPUC to be vital to Qwest’s application.⁸²

A. Jeopardy Notices

KPMG was unable to determine whether Qwest provides jeopardy notices in advance of the due date for resale products and services or UNE-P.⁸³ Qwest also did not satisfy two test criteria, which measured whether Qwest systems or representatives provide timely jeopardy notices for resale products and services or UNE-P.⁸⁴

Qwest has presented the COPUC with Colorado commercial performance data which indicate that Qwest has met the parity requirements for these measures. AT&T claimed that the commercial data prove that Qwest does not comply with checklist item 2 because Qwest does not provide CLECs with as much advance notice of a due date miss as it provides for its own retail customers.

The COPUC relied on Qwest’s commercial data and decided that the OSS test results do not adversely affect CLECs’ ability to access Qwest’s OSS.⁸⁵ As the FCC has recognized, “[t]he most probative evidence that OSS functions are operationally ready is actual commercial usage.”⁸⁶ Notably, during the OSS test, no jeopardy notices were issued for resale and UNE-P product transactions and commercial observations, which leads to the conclusion that Qwest was provisioning in a timely fashion. To assure

⁸² See *Section 271 Compliance Order*, App. A, at pp. 105-107.

⁸³ These test criteria were 12-9-1 and 12-9-2.

⁸⁴ These test criteria were 12-9-4 and 12-9-5.

⁸⁵ See *Section 271 Compliance Order*, App. A, at pp. 65-68.

⁸⁶ *BellSouth Georgia/Louisiana Order* at Appendix D, ¶ 31.

continued compliance, these measures are included in the CPAP on a going-forward basis.

Because the commercial data are the most probative of Qwest's performance, we concluded that Qwest's jeopardy notice provision is acceptable. Furthermore, because the CPAP, by meaningful penalties, punishes any Qwest failure to provide jeopardy notices, we conclude that Qwest has ample incentive to keep this part of its OSS compliant in this regard.

B. Human Error

Human error issues arose in the context of three test criteria, each of which received an "unable to determine" rating by KPMG. In two instances, KPMG was unable to determine whether Qwest-produced measures of ordering and provisioning performance results for HPC transactions were consistent with KPMG-produced HPC measures.⁸⁷ In the third instance, KPMG was unable to determine whether procedures for processing electronically submitted non-flow-through orders are defined, documented, and followed.⁸⁸

Qwest argued that it has made a significant effort to reduce the instances of human error in manual order processing, but admitted that the possibility of manual handling errors is inevitable. In August 2002, Qwest will implement an IMA 10.1 enhancement that adds a system verification to ensure that the service order numbers and due dates on the firm order confirmation are pre-populated from the LSR, which Qwest claims will minimize manual processing errors. According to AT&T, the number of human errors is excessive and has not been reduced to acceptable levels.

⁸⁷ These test criteria were 12-11-4 and 14-1-44.

⁸⁸ This test criterion was 12-8-2.

The COPUC found that the human errors uncovered by KPMG do not constitute a fatal flaw to Qwest's application.⁸⁹ However, the COPUC required the addition to Tier 1B of the CPAP, and Qwest has agreed to develop and submit, a performance indicator definition (PID) for Manual Service Order Accuracy.

Thus, on a going-forward basis, Qwest will have incentives to reduce any human error problems interfering with CLEC services. Because human error is to a certain degree inevitable, Qwest's continuing increase in electronic flow-through of orders – evidenced by commercial performance data for PO-2B – will also mitigate the human error problem. In any event, we conclude that the human error problem is not so great as to throw the entire Qwest OSS out of compliance.

C. "Secret" Agreements and the ROC OSS Test

As is discussed more fully in section VIII(E), *infra*, during the May *en banc* workshops, AT&T presented as exhibits five agreements between Qwest and CLECs in Minnesota, which contain terms and agreements that are not available to other CLECs. KPMG disclosed information identifying specific test sections that contain conclusions that were, at least in part, based on information provided by CLECs which allegedly have "secret" agreements with Qwest. The COPUC examined this issue, including taking testimony, during its *en banc* workshops.

CLECs argued that a determination of OSS compliance should be delayed until an investigation determines what, if any, impact the agreements may have had on the OSS test results.⁹⁰ According to the CLECs, they are unable to determine whether the secret

⁸⁹ Section 271 Compliance Order, App. A, at pp. 73-75.

⁹⁰ The CLECs also used this argument as a basis for their June 17, 2002 request to reopen the KPMB study of CLEC participation in order to determine whether the test results were affected by the unfiled agreements. This effort was unsuccessful.

agreements caused Qwest to discriminate between CLECs because each CLEC is only able to access its own, individual performance data from Qwest.

At bottom, the CLEC complaint is misleading. CLECs are able to access aggregated CLEC performance data, which are public information. Any CLEC with the inclination to do so could have compared its own, individualized performance data to the aggregated CLEC data to determine whether it had been disadvantaged. No CLEC did this simple comparison. As a result, although asked to present *any* information upon which the COPUC might conclude that it should delay its compliance determination because of the unfiled agreements, no CLEC was able to present such data to the COPUC.

In addition, the CLECs made much of the fact that, on its own initiative, KPMG undertook an analysis of whether any CLEC which provided information used in the ROC OSS test had an unfiled agreement with Qwest and, if so, how much of the information used in the ROC OSS test was provided by such a CLEC. (This review is referred to as the “CLEC participation study”). The COPUC inquired into this issue during its *en banc* workshop on the ROC OSS test. In response to questions, KPMG explained that it did the CLEC participation study when it learned of the unfiled agreements because KPMG anticipated that questions would arise concerning the validity of the CLEC information and KPMG wanted to be “pro-active” by having already done a study on the issue. KPMG was clear that it did not undertake this effort because it had any concerns about the information. Based on KPMG’s statements, we are convinced that the mere existence of the CLEC participation study, without more, is insufficient basis for concern.

As a result of its inquiry and the absence of information from CLECs, the COPUC concludes that there is nothing in the record to suggest that the OSS test data are corrupted.⁹¹

D. Data Reconciliation

Liberty Consulting reconciled CLEC-collected data with Qwest-collected data in seven states, including Colorado. Liberty concluded that Qwest's performance reporting correctly and reliably accounted for Qwest's actual performance. The COPUC held proceedings regarding data reconciliation over two days in February. Parties also were afforded the opportunity to address data reconciliation during the final *en banc* workshop in June.

During those proceedings, the record was devoid of any evidence which would require the COPUC to question Liberty's conclusions. Therefore, relying on Liberty, the COPUC submits that Qwest's performance data and results are accurate.

E. Remaining OSS Test Issues

The COPUC considers the remaining OSS test issues, which did not receive a satisfactory finding by KPMG, to be of less significance with respect to Qwest's OSS compliance.

Qwest's provisioning of unbundled dark fiber and EELs, by adhering to documented method and procedure tasks, received a "not satisfied" rating by KPMG.⁹² In Colorado, Qwest's commercial performance indicates that there have been no dark fiber observations since September 2001, and there have been no-region wide observations since November 2001. EELs will be considered under the CPAP during the

⁹¹ *Id.* at pp. 109-110.

⁹² These were test criteria 14-1-10 and 14-1-14.

first six-month review. For now, these products are insignificant to CLECs operating in Colorado and, by implication, these CLECs cannot be harmed by Qwest's OSS performance in this regard.⁹³ To the extent these UNEs become more important to CLECs, and correspondingly Qwest's provisioning performance does too, the COPUC can handle this through the six month review process of the CPAP, which allows for modification of the performance assurance plan to meet changing conditions.

KPMG also found two criteria "not satisfied" relating to non-dispatch orders for PID OP-4C (Installation Interval Met for Business POTS) and PID OP-4C (Installation Interval Met for UNE-P Services).⁹⁴ Qwest has passed the ROC OSS test for business POTS in its central region, which includes Colorado. Furthermore, Qwest's commercial data for the past five months in Colorado indicate that Qwest is meeting the required parity standard under PID OP-4C for both business POTS and UNE-P.⁹⁵ Because Qwest both passed the test in Colorado and its commercial performance data indicate a "passing grade," the COPUC concluded that the "not satisfied" status of these test criteria does not affect CLECs' ability to use Qwest's OSS in Colorado.

KPMG was unable to determine, on a region-wide basis, whether Qwest meets the parity requirements for three PID OP-6A criteria (Delayed Days for Business POTS, Residential POTS, and UNE-P POTS, respectively).⁹⁶ With regard to business POTS,

⁹³ *Section 271 Compliance Order*, App. A, at 79. CLECs did not consider Qwest's "not satisfied" result under test criterion 16-3-5 (peak volume testing for CEMR Functional and Performance Evaluation) to be a fatal flaw. Nor did CLECs indicate that the "not satisfied" criteria under 18-6-1 and 18-6-3 (measuring close-out code accuracy) are fatal flaws in terms of accepting the overall OSS test results. *Id.* at 87. Notably, a comparison with Qwest's commercial performance for these criteria is not possible because the ROC TAG did not develop a PID for close-out codes. The COPUC found that these results do not reveal a material impediment to CLEC access of Qwest's OSS. *Id.* at pp. 89-92.

⁹⁴ These test criteria were 14-1-34 and 14-1-36.

⁹⁵ *Section 271 Compliance Order*, App. A, at pp. 81-82.

⁹⁶ These test criteria were 14-1-37, 14-1-38, and 14-1-39.

KPMG found that Qwest achieved a passing result in the central region, in which Colorado is located. Qwest did not delay any orders for residential POTS or UNE-P POTS during the OSS test. The COPUC found that these results, in conjunction with Qwest's actual commercial performance, do not impact CLECs' ability to access Qwest's OSS.⁹⁷

Qwest did not satisfy the 95 percent benchmark established under test criterion 18-7-1, which measured successful repair of out-of-service and service-affecting wholesale UNE-P, resale, and Centrex troubles (for dispatch and non-dispatch). Of 259 troubles submitted, Qwest successfully repaired 92 percent. Qwest argued that PID MR-7 should have applied to this component because the FCC has indicated a preference for a parity standard over absolute benchmarks with respect to maintenance and repair.⁹⁸ PID MR-7 evaluates "the accuracy of repair actions, focusing on the number of repeat trouble reports received for the same trouble within [30 calendar days]." Qwest's parity performance under PID MR-7 in Colorado has been satisfactory. No CLEC asserted that this measurement constitutes a fatal flaw to a finding of OSS compliance.

KPMG was unable to observe five miscellaneous test criteria during the test, including whether: (1) Daily Usage Feed (DUF) is corrected and returned according to a defined schedule; (2) CLECs can readily obtain status on DUF requests; (3) defined processes for network design report (NDR) implementations are adhered to; (4) customer calls are returned per documented or stated intervals; and (5) training of representatives is

⁹⁷ *Id.* at pp. 83-84.

⁹⁸ *BANYOrder* at n. 697.

defined, documented, and followed.⁹⁹ KPMG was similarly “unable to determine” four billing production criteria.¹⁰⁰

In every instance, KPMG was able to conclude (through, for example, interviews with Qwest personnel and documentation reviews) that processes are in place for each component measured by the test criteria. However, there was no activity during the test to assess the efficacy of those procedures. CLECs did not file an objection to any of these criteria, leading the COPUC to conclude that these test measures are of negligible importance to CLECs.¹⁰¹

On a final note, the COPUC asked CLECs whether they disagreed with any results that KPMG had found to be satisfied. AT&T objected to the results of four criteria, which measured the completeness and accuracy of Qwest’s DUF production and distribution processes. DUF testing was conducted on six occasions before KPMG concluded that Qwest had passed. The COPUC relies on KPMG’s professional judgment that Qwest passed these test criteria.

In sum, the COPUC believes that the Qwest OSS meets the § 271 requirements. Even where Qwest fell short of certain test criteria, the breadth and rigor of the whole test must be kept in mind. This has been the most comprehensive test to date of a BOC’s OSS systems. It is not optimal that not all parts of the test were satisfied. Still, in our judgment, the OSS as a whole is functional, capable of being used by CLECs, and gives parity of performance or meets relevant benchmarks. Where the test shows Qwest not meeting the relevant standard, the COPUC is convinced that the deviation is either trivial

⁹⁹ These test criteria were 19.6-1-17, 19.6-1-19, 22-1-10, 24.3-9, and 24.10-3-4.

¹⁰⁰ These test criteria were 20.7-1-3, 20.7-1-4, 20.7-1-5, and 20.7-1-9.

¹⁰¹ *Section 271 Compliance Order*, App. A, at p. 105.

for competitive purposes, or, more importantly, can be addressed on a going-forward basis by enforcement through the CPAP. While the OSS test is a snapshot, the actual performance of the OSS going-forward is what matters to the COPUC and to CLECs. We are confident that we have authored a performance assurance plan that will keep Qwest's OSS performing consistent with the obligations under the Act.

VII. CHANGE MANAGEMENT

Beginning in July 2001, Qwest, CLECs and COPUC staff began meeting in a collaborative effort to redesign Qwest's change management process (CMP). The participants in the redesign process have met for more than 45 days over the past 11 months to discuss every aspect of Qwest's CMP. CLECs and Qwest have made every effort to achieve consensus. As a result, the COPUC agrees with Qwest's contention that "it has in place the most comprehensive, inclusive and forward-looking change management plan in the nation."¹⁰²

This section proceeds in two parts. First, the CMP measures from the ROC OSS test are explored. Second, the COPUC presents its analysis of Qwest's CMP under the FCC's five-factor test, in addition to the adequacy of technical assistance provided by Qwest to CLECs and the demonstration of a pattern of compliance with Qwest's CMP over time.¹⁰³

A. ROC OSS Test Issues

With regard to the CMP, the ROC OSS test examined the adequacy and

¹⁰² *Qwest Application* at 131. For an expanded description of the change management redesign process, see *Section 271 Compliance Order*, App. A, at pp. 112-114.

¹⁰³ See *BellSouth Georgia/Louisiana Order* at Appendix D, ¶¶ 40, 42.

completeness of procedures for developing, publicizing, evaluating, and implementing changes to Qwest's wholesale OSS interfaces and business processes. *See* Test 23 in ROC OSS test. The test also focused on the tracking mechanisms of proposed changes and adherence to established change management intervals. Of the 48 testing criteria in Test 23, KPMG reached "unable to determine" conclusions on seven. Under Test 24.6, which evaluated Qwest's OSS interface development, KPMG identified 30 test criteria and concluded that two were "not satisfied." This subsection addresses those criteria that do not *directly* relate to the FCC's CMP framework. The remaining OSS issues are discussed in the subsection that follows.

Tracking of Information. One issue that arose in the context of the OSS test concerned Qwest's ability to implement procedures and systems to track information such as descriptions of proposed changes and key notification dates. KPMG was "unable to determine" whether Qwest met criterion 23-1-7. The COPUC found that the "unable to determine" result in this instance is ultimately irrelevant for two reasons.¹⁰⁴ First, under PID PO-16 contained in the CPAP, the timeliness for initial and subsequent release notifications has a 100 percent benchmark, carrying daily penalties ranging from \$50-\$200 per day. Second, Qwest has met the 100 percent benchmark in two out of the last six months. In two of the other six months, no notifications were sent to CLECs. In all likelihood, KPMG would have found that Qwest satisfied this criterion given another month or two of testing. This rationale applies with equal force to test criterion 23-1-9 (Compliance with Notification Intervals).

Therefore, because Qwest has met the criteria for PID PO-16 in most of the recent

¹⁰⁴ *Section 271 Compliance Order*, App. A, at 119.

months and because there are meaningful penalties on a going-forward basis to give Qwest the incentive to comply, we believe that this unable to determine finding of KPMG is not sufficient to delay Qwest's entry into the interLATA market.

Prioritization and Severity Coding. KPMG was unable to determine whether standards are defined for the prioritization system and for severity coding under test criterion 23-1-8. KPMG based its finding on the fact that the COPUC had resolved an impasse issue, in March 2002, finding that change requests related to PIDs or PAPs should not be classified as regulatory changes in the release prioritization process (which, in effect, would allow those change requests to "trump" other change requests).¹⁰⁵ Because Qwest had already prioritized IMA Releases 10.0 and 11.0 with PID and PAP requests bypassing other change requests, KPMG was unable to observe a full prioritization with the COPUC's decision in practice.

The COPUC believes that KPMG erred in reaching an "unable to determine" result.¹⁰⁶ Qwest and the CLECs had prioritized IMA releases 10.0 and 11.0, and the impact of the COPUC's resolution of the PID/PAP change request impasse issue did not affect the basic prioritization process itself. Qwest has adhered to the CMP prioritization process and should not be penalized with further testing. Consequently, this "unable to determine" finding is not an impediment to finding a compliant CMP.

The CMP is in Place and is Documented. Due to ongoing negotiations in the CMP redesign process, at the close of the test, KPMG could not determine whether the CMP process was fully implemented or documented. The final CMP document will be presented to the larger CMP participants in mid-July for approval. Before our June 13,

¹⁰⁵ See *SGAT Compliance Order*, at pp. 22-26.

¹⁰⁶ *Section 271 Compliance Order*, App. A, at pp. 123-126.

2002 deliberations meeting, Qwest had already implemented and posted on its website CLEC-benefiting processes that go well beyond any CMP previously approved by the FCC. By mid-June, the redesign team had reached agreement on all twelve of the identified category “1” issues, which were ranked as the most controversial and potentially the most business affecting, and eight of ten of the identified category “0” issues, which were ranked as less controversial. Due to the passing of time, and the efforts completed by the redesign team, this “unable to determine” finding of KPMG is a non-issue.

Tracking Notification Intervals and Prioritization. KPMG did not reach a result on three criteria measuring the implementation of product and process CMP.¹⁰⁷ Qwest has recently added five levels of Qwest initiated Product and Process changes to the CPAP. The COPUC will incorporate penalties associated with the associated deliverables into the SGAT.¹⁰⁸ This new process categorizing Product and Process changes has been in effect since mid-April 2002. KPMG was not able to evaluate Qwest’s adherence to this process due to the ending of the test. In our own evaluation of the Product and Process notifications and categorizations since April, we find that Qwest has adhered to this new process and therefore, KPMG’s “unable to determine” finding is a non-issue. Moreover, because the Qwest initiated Product and Process change deliverables will be part of the CPAP, we have some measure of confidence that Qwest will maintain an adequate Product and Process CMP.

Mediated Access System for Electronic Bonding Trouble Administration. According to KPMG’s findings, Qwest did not satisfy test criterion 24.6-2-9, which

¹⁰⁷ These were test criteria 23-2-7, 23-2-8, and 23-2-9.

¹⁰⁸ *Section 271 Compliance Order*, App. A, at pp. 139-141.

measured whether carrier-to-carrier test environments are available and segregated from Qwest's production and development environments. CLECs did not address this issue in their written comments, and it was given scant attention at the *en banc* workshops. Additionally, the COPUC is satisfied that there is no problem with the carrier-to-carrier testing environment offered by Qwest, including the use of the production version of LMOS for testing purposes. The CLECs' silence on this issue speaks to its limited import. The COPUC considers this issue to be closed.¹⁰⁹

B. Compliance with the FCC's Framework

Accessibility and Organization of Information Relating to the Change Management Process. The draft CMP document has been available on Qwest's wholesale website for months and is clearly written. The final CMP document will be presented to the full CMP/CLEC community mid-July. The Qwest and CLECs jointly determined the contents of the CMP document and the CMP website during the redesign process. Qwest clearly meets this element of the FCC's test.

CLEC Input into the Design and Continued Operation of the Change Management Process. As described above, the participants in the CMP redesign process have met for a total of 45 days in little less than a year. Several CLECs have actively and continuously participated in the redesign meetings. Qwest and CLECs will continue to meet in the future to discuss both systems and product/process change requests. Qwest also meets this element of the FCC's test.

Procedures for the Timely Resolution of Change Management Disputes. For the CMP, disputed change requests are escalated to a single point of contact in the Qwest organization and replies are required within seven days (all other escalations require a

¹⁰⁹ *Id.* at pp. 149-151.

reply within two weeks). CLECs have the option of bypassing the escalation process altogether and submitting their dispute to an arbitrator or the COPUC. To the COPUC's knowledge, approximately ten issues have been taken to the escalation process and have been, or are in the process of being, resolved. Although the dispute resolution process has yet to be employed, the COPUC takes comfort in the fact that it is substantially similar to the dispute resolution process that is contained in the SGAT itself. In sum, the CMP contains an adequate procedure for the resolution of disputes.

Availability of a Stable Testing Environment that Mirrors Production. In the OSS test, KPMG found that Qwest did not satisfy test criterion 24.6-1-8, which assessed whether Qwest has a functional test environment available to customers for all supported interfaces. Before August 2001, Qwest supported only its Interoperability (Interop) test environment for CLECs testing an EDI interface. KPMG identified a number of Interop deficiencies; and, in response, Qwest developed and introduced the Stand Alone Test Environment (SATE) in August 2001. Interop was not modified. However, CLECs have the option of using the test environments separately or in combination.

KPMG evaluated SATE, found that it does not support flow-through transactions, and issued Exception 3077. Qwest asked KPMG to close the exception as unresolved. Later, KPMG identified problems relating to the addition of new or existing products to the functionality of SATE. Again, Qwest asked KPMG to close the exception as unresolved.

Qwest argued that it would implement flow-through capability in SATE to resolve that issue raised by KPMG. According to Qwest, SATE will provide the same key functions as the production environment. Qwest pointed to the commercial

experience of CLECs as demonstrating that SATE currently allows for EDI testing and production. CLECs argued that SATE is still a work in progress and does not pass the FCC's test, particularly when it is compared to the test environment implemented by Verizon. Furthermore, CLECs claimed that enhancements to SATE, such as the Virtual Interconnect Center Knowledge Indicator (VICKI), fail in key areas.

The COPUC anticipates that this will be the most heavily contested CMP issue before the FCC.¹¹⁰ Indeed, we ourselves deemed it the “closest call” of the whole § 271 record.¹¹¹

Qwest has taken a number of strides in the past year in developing SATE. The addition of VICKI in January 2002 and flow-through in May 2002 address many of the concerns listed by KPMG in Exception 3077. At present, SATE appears to comply with the FCC's requirements.

That said, the record contains little evidence of an fully functional, flow-through capable SATE. Therefore, to ensure that Qwest has the incentive to continue meeting its obligations on a going forward basis, the COPUC required Qwest to include a new PID, PO-19, in the CPAP as a Tier 2 measure. The new PID will carry with it a 95 percent performance benchmark and a \$50,000 payment penalty. When this PID is redefined to include PO-19b that will measure the “mirroring of production” that new definition will be incorporated in the CPAP with appropriate penalties. With the addition of a protective measure in the CPAP, the COPUC is satisfied that Qwest meets this facet of CMP.

The COPUC recognizes that this solution may fall short of the FCC's black letter criterion on the need for a functional, flow-through capable SATE. Nevertheless, we

¹¹⁰ *Id.* at pp. 144-147.

¹¹¹ *Id.* at p. 146.

believe that the CPAP penalty provides an adequate forward-looking incentive for Qwest to maintain a functioning SATE. Furthermore, we identify the SATE issue as the only significant “loose end” remaining in this application. Because we find Qwest compliant in all other respects, and we see no profit from additional months of delay to fix this one imperfection, we elect to endorse the application with the assurance of the CPAP guaranteeing a compliant SATE.

Efficacy of the Documentation Used by CLECs to Build an EDI Interface. The documentation supplied to CLECs by Qwest under the CMP is robust. Qwest provides CLECs with an EDI development process, interface specifications, technical specifications, change notifications and an actual walk-through if requested.

Technical Assistance. Qwest offers a full panoply of adequate technical assistance to CLECs. The COPUC echoes the expansive list of measures that Qwest describes in its application.¹¹² These measures include a Help Desk, personalized training and assistance (including classroom training), access to Qwest’s wholesale website, web-based interactive training, and handbooks and catalogs. CMP passes on this front.

Pattern of Compliance with the Change Management Process. As language was agreed to in the redesign process it was added to the CMP document, and Qwest implemented them in timely fashion. The CLECs concern on this requirement is that Qwest and the CLECs have not jointly participated in a prioritization process since this Commission’s decision on the PID/PAP change requests. As stated above, the COPUC has found that Qwest has followed the basic process of prioritization for IMA releases

¹¹² *Qwest Application* at p. 142.

10.0 and 11.0 The bulk of the CMP provisions have been in place for months and Qwest has adhered to these provisions. Qwest's ongoing compliance with the CMP is fully supported by the record.

VIII. THE PUBLIC INTEREST

In addition to the competitive checklist items enumerated under § 271(c)(2)(B) of the Act and § 272, Qwest bears the burden of proof in showing that its requested authorization would be consistent with the public interest, convenience, and necessity.¹¹³ The FCC has explained that the public interest analysis is “an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open . . .”¹¹⁴

In line with COPUC precedent, and consistent with the FCC's standards, the hearing commissioner applied the COPUC's public interest analysis - namely, whether consumer and producer welfare will be maximized by Qwest interLATA entry - to the record and impasse issues raised in the collaborative workshops. AT&T objected to the COPUC's equation of the public interest with total welfare maximization as the basis for its analysis. The hearing commissioner declined to adhere to AT&T's own, “necessarily open-ended,” public interest inquiry.¹¹⁵ Put simply, limiting the inquiry in advance along sound economic and legal principles allows for reasoned decision making by the fact-finder and reasoned record-making by the participants.¹¹⁶

¹¹³ 47 U.S.C. § 271(d)(3)(C); *SBC Arkansas/Missouri Order* at n. 394.

¹¹⁴ *BellSouth Georgia/Louisiana Order* at ¶ 280.

¹¹⁵ See *Motion to Modify Volume 7 Order, Qwest Application*, App. C, Vol. 1, Tab 31.1, at 6 (noting that modern antitrust jurisprudence is based on the consumer welfare standard).

¹¹⁶ To the extent the FCC believes it necessary to go beyond a delimited consumer welfare standard, such evidence is in this record. AT&T, in particular, had no particular compunction in pleading anything it wanted under this “*et cetera*” portion of the § 271 record.

The COPUC submits that Qwest's entry into the interLATA market will enhance total welfare and that the alleged harms and remedies that CLECs have raised in the Colorado proceedings do not override these welfare gains. As discussed above, the COPUC has certified Qwest's compliance with the 14-point checklist. Competitive barriers to entry in the local market have been removed, and the local exchange markets in Colorado are open to competition.¹¹⁷ With the addition of the CPAP to Qwest's SGAT, the COPUC is confident that Qwest will continue to meet its § 271 obligations following FCC approval of its application. The most important aspects of the COPUC's public interest inquiry are now addressed in turn.

A. Colorado Performance Assurance Plan (CPAP)

Although a performance assurance plan is not a condition for § 271 approval, the COPUC believes the CPAP is the most vital element in Qwest's application on a going-forward basis.¹¹⁸ The CPAP and the regulatory regime it establishes will remain a crucial legacy of the § 271 process.

While the FCC has not mandated a specific model for wholesale performance assurance plans, it has offered some basic guidelines for states to follow in designing them. In its recent *Verizon Maine Order*, the FCC listed the key elements in an acceptable performance assurance plan, including: total liability at risk; the definitions of the performance measures and standards; the structure of the plan; the self-executing nature of the remedies in the plan; the plan's data validation and audit procedures; and

¹¹⁷ "BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist." *BellSouth Georgia/Louisiana Order* at ¶ 281.

¹¹⁸ *BANY Order* at ¶ 429.

the plan's accounting requirements.¹¹⁹ The FCC also noted that it “took comfort” in the fact that the Maine Commission would review and revise its performance assurance plan as necessary.

In its broad contours, the CPAP resembles the performance assurance plan that was adopted by the Texas Commission and approved by the FCC in the *SBC Texas Order* (Texas plan).¹²⁰ However, the CPAP differs from the Texas plan in many respects, as well as differing from the Qwest Performance Assurance Plan (QPAP) that has been adopted by the other states in Qwest's consolidated application.

In the COPUC's opinion, the CPAP is substantially less tolerant of deficient performance than previously approved plans. Fundamental differences between the CPAP and the Texas plan include, for example, the tiered measurement and payment structure, the inclusion of severity multipliers for measures deemed to be “most important,” additional protection for smaller CLECs, annual cap on liability, escalation payments that continue to increase beyond six months, and the use of an Independent Monitor to resolve disputes between the parties.

The CPAP is a voluntary stand-alone section of Qwest's SGAT, and each CLEC has the option of electing the CPAP or negotiating an alternative regime with Qwest. In general, the CPAP is a two-tiered, self-executing remedy plan. The performance measurements are divided into two major categories: Tier 1 and Tier 2. Tier 1 measurements provide, in part, for damages directly payable to CLECs for substandard performance. Tier 2 measurements, such as handling of LSRs or change management,

¹¹⁹ *Verizon Maine Order* at ¶ 63.

¹²⁰ See SWBT T2A Agreement, Attachment 17 (available online at <https://clec.sbc.com/clec/unrestr/interconnect/t2a/t2a.cfm>).

support competition as a whole and are not measured on a carrier-by-carrier basis.

Because the CPAP primarily focuses on the CLEC needs which are the most competitively significant, the Tier 1 measurements are further broken down into three subcategories: Tier 1A (201 measurements), 1B (380 measurements) and 1C (6 measurements).¹²¹ Tier 1A measurements focus on interconnection, switching of customers, collocation, and access to unbundled local loops - areas which go to the heart of Qwest's market power and are thereby critical to the competitive process. Tier 1B and 1C measurements address those areas of performance that are "very significant" or "significant" for competition, such as pre-order, provisioning, maintenance and repair, and billing.

The payment structure under Tier 1 is also divided into two categories: Tier 1X and Tier 1Y. Tier 1X payments are directly compensatory to CLECs and, in order to more accurately reflect the amount of deficient performance, are made on a per occurrence basis. Tier 1A measures trigger a per occurrence violation payment of \$225, Tier 1B violations trigger a \$75 payment, and Tier 1C violations trigger a \$25 payment.¹²²

For Tier 1A measurements, the average performance Qwest provides in a given month is compared to the average of Qwest's prior six months of retail performance, subject to a variance table that will modify the applicable benchmark.¹²³ This methodology will minimize the impact of smaller sample sizes on the ultimate calculation

¹²¹ This structure may be considered analogous to the division of performance measurements into "High," "Medium," or "Low" categories in the QPAP and the Texas plan.

¹²² *Qwest Application*, SGAT Exhibit K, pg. 6, Table 3. Tier 1B and 1C base payments are the same as those under Tier 1 of the QPAP that are rated "Medium" or "Low." However, Tier 1A base payments are \$75 higher than a Tier 1 payments rated "High" under the QPAP.

¹²³ *Id.* at § 7.1.

and will also give CLECs the ability to plan ahead and roughly anticipate when they can expect compensation for deficient performance. Furthermore, the COPUC adopted a modified z-test for calculation of Tier 1B and Tier 1C measures, which adequately protects Qwest against random variation.

For Tier 1X payments, the CPAP also includes a severity calculation with multipliers that apply to the base payment in order to penalize greater misses at a higher rate.¹²⁴ Misses of more than 50 percent over two or more consecutive months for Tier 1A and Tier 1B measurements also result in additional payments on a per occurrence basis of \$25,000 and \$8,000, respectively, to the Tier 2 Special Fund.¹²⁵ Importantly, and in recognition that poor performance has a disproportionate impact on smaller competitors, certified CLECs with less than 100,000 lines in service are eligible to receive an increased Tier 1A base payment of \$600 per occurrence and a Tier 1B base payment of \$300 per occurrence.¹²⁶

Tier 1Y payments are escalated Tier 1X payments, with 50 percent going to CLECs and 50 percent going to the Tier 2 Special Fund over the first twelve consecutive months of deficient performance.¹²⁷ Whereas some plans cap the total amount of escalated payments, the CPAP calls for continued escalated payments until Qwest remedies the continuing deficient performance – thereby ensuring that the prescribed payments are not viewed as a “cost of doing business.” Thus, unlike the QPAP, which

¹²⁴ *Id.* at § 7.4.

¹²⁵ *Id.* at § 10.3. The Tier 2 Special Fund is used to pay administrative expenses, such as the Independent Monitor and the Auditor, and to provide competitively-neutral enhancements to telecommunications in Colorado.

¹²⁶ *Id.* at § 9.

¹²⁷ *Id.* at § 8. After twelve consecutive months of deficient performance, and in order to avoid payments that may constitute a “windfall” to competitors, CLECs are eligible to receive 50 percent of the escalated payment that was due in month twelve, with the remaining payment going to Tier 2.

limits escalated payments after six months of deficient performance, the CPAP is calibrated to kick-in more strongly with continuing, deficient performance. The CPAP allows for the possibility of escalated payments *ad infinitum*, with payments “stepping down” in months where Qwest meets performance benchmarks.¹²⁸

The plan includes an annual cap of \$100 million for Tier 1 damages and Tier 2 assessments and a proportional monthly cap.¹²⁹ The COPUC believes this amount is sufficient to deter Qwest from viewing wholesale performance as a cost of doing business.¹³⁰ Penalties imposed by the Independent Monitor or by the COPUC, damages awarded in any associated action, as well as penalties such as late payments and late or inaccurate reports, will not be applied towards the cap.

Tier 1X payments will be made to CLECs first, even if those payments exceed the monthly cap, and any remaining balances in a given month will roll forward to a month where required payments lie below the cap.¹³¹ The monthly and annual caps also serve as a signal to the COPUC, which has the option to open a show cause proceeding when Qwest payments exceed the annual cap for two years in a row or exceed 1/3 of the annual cap in two consecutive months.¹³² Remedies available to the COPUC include raising the annual cap or requesting the FCC to halt Qwest’s long distance marketing authority for a specified time period.

The effective design of performance measurement and reporting is a basic precondition for ensuring reliable wholesale performance. Qwest will post all data and

¹²⁸ Tier 1C payments are capped at \$5,000 per measurement in Month 1, with a total cap per measurement of \$30,000. *Id.* at § 8.1.

¹²⁹ *Id.* at § 11.

¹³⁰ See *Qwest Application* at 184, n. 12 (stating that Net Return based on ARMIS data for 1999 in Colorado is \$100,000).

¹³¹ *Id.* at § 11.3.

¹³² *Id.* at § 11.4.

changes to its Performance Measurement and Reporting System on a publicly-available website dedicated to the CPAP. Because Qwest may not have the natural incentive to report its performance in a reliable manner, performance measures will be independently audited on an annual basis.¹³³ CLECs also have the option to request a “mini-audit,” and the COPUC may request an audit to examine any aspect of Qwest’s wholesale performance at any time it deems appropriate. Late or inaccurate monthly reporting of performance data (unless it is timely cured by Qwest) and unauthorized fundamental changes to the Measurement and Reporting System will be heavily penalized.¹³⁴

The CPAP is dynamic and flexible in order to account for the rapid pace of technological change in the industry. Every six months, the COPUC will hold proceedings to review the CPAP and assess whether any PIDs should be added, modified, deleted, or weighted differently. In order to mitigate the possibility of regulatory gaming at the six month review, certain architectural aspects of the plan (*e.g.*, the payment structure and caps) are explicitly left “off the table” until the three year, comprehensive review by the COPUC takes place.¹³⁵ Finally, to assist the COPUC in resolving disputes arising under the CPAP, an Independent Monitor will be appointed by the COPUC. To the COPUC’s knowledge, no other plan envisions the use of a qualified expert to aid in managing the resolution of disputes.

For the foregoing reasons, the COPUC believes that the CPAP improves upon all other PAPs in existence by focusing most intently on the core competitive needs of

¹³³ See generally *id.* at § 14.0.

¹³⁴ *Id.* at §§ 13.3 *et seq.*, 14.3.

¹³⁵ *Id.* at § 18.7.

CLECs and by providing powerful incentives for Qwest to maintain continuous, adequate wholesale performance.

B. UNE Rates/Price Squeeze

AT&T compared recurring and non-recurring residential (1FR) rates against UNE rates and argued that it cannot profitably enter the Colorado market using the UNE-P. The hearing commissioner held that AT&T failed to prove the existence of a price squeeze in Colorado¹³⁶ and declined to find that CLECs are “doomed to failure” under the standard announced by the D.C. Circuit in the recent *Sprint v. FCC* ruling.¹³⁷ Likewise, in Docket 577T, the COPUC analyzed evidence of a price squeeze with Colorado’s UNE-P rates and the regulated retail rates. The COPUC concluded that evidence in our cost docket record “does not support the argument that the rates adopted here make a price squeeze unavoidable or even probable.”¹³⁸

The Colorado legislature elected to cap residential retail rates in 1995.¹³⁹ By statute, Qwest’s residential retail rate for basic local service is \$14.92. The COPUC understands how this price control can lead to the allegation of a regulatory price squeeze; however, the concern is mitigated when the analysis takes into account a realistic market definition. CLECs can enter the residential market through resale, wireless, and facilities-based competition.¹⁴⁰ Indeed, AT&T Broadband is the most robust competitor in the Colorado residential market. Its facilities-based strategy completely bypasses the UNE-P price squeeze concern altogether.

¹³⁶ *Volume 7 Order, Qwest Application*, App. C, Vol. 1, Tab 29.1, at n. 76 (emphasizing that the record is insufficient to support a factual finding of a price squeeze).

¹³⁷ 274 F.3d 549, 554 (2001).

¹³⁸ *Ruling on Applications for Rehearing, Reargument or Reconsideration* (Decision No. C02-409), at p. 19, *Qwest Application*, App. C, Vol. 2, Tab 11.

¹³⁹ § 40-15-502(3)(b)(I), C.R.S.

¹⁴⁰ *Id.* at 35.

Furthermore, the COPUC believes that a UNE-P regulatory price squeeze,¹⁴¹ *even if it exists*, would not affect the public interest conclusion. Under the rationale set forth by then-Judge Breyer in *Town of Concord v. Boston Edison Company*,¹⁴² regulators should be wary of allowing a price squeeze allegation to turn into competitor profit protection regime. In *Town of Concord*, three towns challenged the wholesale/retail rate differential of their wholesale power provider, Boston Edison. Judge Breyer concluded that no Sherman Act violation had occurred because effective price regulation at the wholesale and retail levels makes it unlikely that anticompetitive harm will take place.¹⁴³

Judge Breyer continued:

[R]egulators try to set prices that reflect costs. To the extent they succeed, the integrated utility's prices are likely to squeeze independent distributors who buy from it at wholesale only if those distributors operate less efficiently, *i.e.*, at higher cost. Consequently, a rule preventing prices that create a squeeze *will more likely discourage efficient operations and deprive consumers of prices that reflect lower cost.*¹⁴⁴

Therefore, although the alleged price squeeze here may delay or impede competitive residential entry through the UNE-P, consumers are not harmed when prices are properly regulated at the wholesale and retail level.

The hearing commissioner's findings anticipated the FCC's price squeeze analysis in the *Verizon Vermont Order*, *Verizon New Jersey Order*, and the *BellSouth Georgia/Louisiana Order*.¹⁴⁵ In rejecting AT&T's argument in the *Georgia/Louisiana Order*, the FCC found "that the Act contemplates the existence of subsidized local rates

¹⁴¹ A "regulatory" price squeeze is differentiated from a "classic" price squeeze because it is the regulators, and not a private firm, that set rates at different levels of an industry. Allegations of a regulatory price squeeze most often occur in the electricity industry. *Id.* at pp. 36-38.

¹⁴² 915 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991).

¹⁴³ *Id.* at p. 19.

¹⁴⁴ *Id.* at p. 26 (emphasis added).

¹⁴⁵ *Verizon Vermont Order* at ¶¶ 65-73; *Verizon New Jersey Order* at ¶ 169; *BellSouth Georgia/Louisiana Order* at ¶¶ 283-289.

in high-cost areas and addresses such potential price squeezes through the availability of resale.”¹⁴⁶ AT&T has provided the COPUC with no evidence to show that the circumstances are any different in Colorado than they are in Georgia, Louisiana, New Jersey or Vermont.

C. Structural Separation

AT&T and WorldCom advocated the structural separation of Qwest’s wholesale and retail operations. The FCC has never required structural separation to be a prerequisite to a public interest finding under § 271. In addition, the hearing commissioner found that the factual record to support a remedy as drastic as structural separation was entirely lacking – there was no attempt by the moving parties to define the relevant market, no cost/benefit analysis was presented, and no effort was made to justify structural separation against other, less draconian remedies.¹⁴⁷ Structural separation is not a public interest prerequisite to § 271 authority.

D. Intrastate Access Charges

According to AT&T, even with imputation of access rates to Qwest’s retail revenues, Qwest’s intrastate access revenues are priced above cost and will allow Qwest to cross-subsidize other products and services to the detriment of CLECs. Noting that the imputation requirements are meant to protect competitors against predatory pricing, the hearing commissioner emphasized that AT&T failed to present sufficient evidence, including facts and expert testimony, to prove that intrastate access charges are a means

¹⁴⁶ *BellSouth Georgia/Louisiana Order* at ¶ 287.

¹⁴⁷ For a comprehensive discussion on the ills of structural separation, see *Volume 7 Order, Qwest Application*, App. C, Vol. 1, Tab 29.1, at pp. 52-64.

of raising a rival's costs.¹⁴⁸ Notably, the COPUC intends to take up access charge reform at the conclusion of the § 271 docket.¹⁴⁹ As the FCC has recognized, Congress enacted § 272 because "it anticipated that some Bell Operating Companies would obtain authorization under 47 U.S.C. § 271 to originate in-region long distance services before the completion of access charge reform."¹⁵⁰ In-state access rates, thus, do not present a public interest impediment to a § 271 grant.

E. CLEC Bankruptcies and Residential Competition

AT&T argued that prospects for UNE-based residential competition are poor because the recent wave of CLEC bankruptcies threatens penetration by Qwest's competitors in the local market. In a related argument, AT&T claimed that the local market is not open because, according to AT&T, there is no meaningful residential competition in Colorado. The hearing commissioner pointed to the FCC's *Verizon Rhode Island Order* as rejecting precisely the same argument. In that order, the FCC stated that "[f]actors beyond the control of the applicant, such as a weak economy, individual competing LEC and out-of-region business plans, or poor business planning by potential competitors can explain the lack of entry into a competitive market."¹⁵¹

F. "Secret" Agreements between Qwest and its Competitors

In the May *en banc* workshops, AT&T presented as exhibits five agreements between Qwest and CLECs in Minnesota, which contain terms and agreements that are not available to other CLECs. For example, an agreement with Eschelon contains

¹⁴⁸ *Motion to Modify Volume 7 Order, Qwest Application*, App. C, Vol. 1, Tab 31.1, at 14.

¹⁴⁹ *Id.* (noting that sequential treatment of section 271 and access reform is necessitated by scarce COPUC resources).

¹⁵⁰ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 5 FCC Rcd 9587 (2000), at ¶¶ 19-20.

¹⁵¹ *Verizon Rhode Island Order* at ¶106; see also *BellSouth Georgia/Louisiana Order* at ¶ 282 (reiterating the same).

provisions that represent off-tariff, off-ICA discounts that are not available to other CLECs and another provision whereby Eschelon “agrees not to oppose Qwest’s effort regarding § 271 approval or to file complaints before any regulatory body concerning issues arising out of the parties’ interconnection agreements.” AT&T argued that these agreements are in plain violation of §§ 251(b) and 252(c) of the Act and that Qwest’s § 271 application should be denied until further proceedings address the issue. Both AT&T and Eschelon have pressed the COPUC to reopen the § 271 proceedings and take further evidence to decide the impact these agreements may have on the public interest analysis or Qwest’s compliance with the competitive checklist.

Qwest opposed reopening the proceedings, noting that the agreements were already in the record and emphasizing that the FCC has accepted a Qwest-initiated Petition for a Declaratory Ruling, which seeks clarification on the applicability of the 90-day pre-approval process under § 252 of the Act. Qwest also has made available copies of all contracts, agreements, and letters of understanding with CLECs that create forward-looking obligations to meet the requirements of § 252(a).

COPUC staff and counsel are informally investigating whether Qwest has entered into similar agreements with CLECs in Colorado. No violation of the law has been established, nor has there been a dispositive explanation by Qwest or a final judgment by the FCC that these agreements are legitimate. In the meantime, the sole remedy that the COPUC can impose is delay. Further delay of a process that has been nearly three years in the making does little in the way of advancing consumer welfare.

In a “but for” world, the potential impact of CLEC *non*participation in the collaborative process is, at worst, close to nil. Smaller CLECs have elected to avoid the §

271 process altogether for a variety of reasons. Several CLECs have consistently participated, and others have participated when and as it was in their best interests to do so. The vast majority of impasse issues in Colorado have similarly been presented to the multistate facilitator, the Washington Commission, and the Arizona COPUC for resolution. At the end of the day, no SGAT provisions would be worded differently, prices would not be adjusted, and impasse issue resolutions would not be modified. Such certainty is the incremental benefit of holding open, exhaustive § 271 proceedings.

Because, therefore, there is no remedy within the § 271 context to deal with the “secret” agreement issue, the COPUC urges the FCC not to delay a § 271 finding. The status of the “secret agreements” can be litigated in a separate docket, on a separate track, where an adequate remedy or penalty, if warranted, can be imposed.

IX. SECTION 272

Section 272 of the Act and the FCC’s rules define the structural and non-structural safeguards applicable to the provision of in-region, interLATA services by an affiliate of the BOC following § 271 approval. These requirements ensure that improper cost allocation and cross-subsidization does not occur between the BOC (here, Qwest Corporation or QC), and its § 272 affiliate (Qwest Communications Corporation or QCC). Furthermore, these safeguards are designed to guarantee that a BOC will not discriminate in favor of its § 272 affiliate. In Colorado, the COPUC examined the record in order to determine whether Qwest will comply with § 272 by making “a predictive

judgment regarding the future behavior of the BOC.”¹⁵² AT&T challenged Qwest’s compliance with § 272. The most important issues are highlighted here.

Qwest demonstrated that QCC already meets the separation requirements of § 272(a). AT&T raised three instances in which the FCC has found that Qwest or U S WEST provided in-region, interLATA services in violation of § 271.¹⁵³ After recognizing that the FCC looks to past and present behavior to assess Qwest’s compliance with § 272 in the future, the hearing commissioner found that the disputed circumstances cited by AT&T were ancillary to the primary inquiry here – namely, whether Qwest will provide in-region, interLATA service through a separate affiliate in the future.¹⁵⁴

Qwest also showed that it will meet the requirements of § 272(b)(2), which requires the § 272 affiliate to maintain separate books, records and accounts. AT&T raised a number of issues, including Qwest’s use of generally accepted accounting principles, Qwest’s audit trail, and the sufficiency of Qwest’s internal controls. In particular, AT&T pointed to the failure by Qwest to timely book billable transactions between QC and QCC between July 2000 and April 2001. The hearing commissioner agreed with the multistate facilitator, who concluded that Qwest has taken a number of steps to cure past transgressions and ensure the present performance is satisfactory.

In order to verify that these steps were effective in practice, the multistate

¹⁵² *Ameritech Michigan Order* at ¶ 347. The participants to the Colorado proceedings agreed in advance to submit briefs, comments, and testimony from the multistate workshops.

¹⁵³ *Petition for U S West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, CC Docket No. 97-172, Memorandum Opinion and Order, FCC 99-133 (rel. Sept. 27, 1999); *AT&T Corp. et al. v. U S West Communications, Inc.*, File No. E-99-42, Memorandum Opinion and Order, FCC 98-242 (rel. Oct. 7, 1998); *AT&T Corp. v. U S West Communications, Inc.*, File No. E-99-28, Memorandum Opinion and Order, DA01-418 (rel. Feb. 16, 2001).

¹⁵⁴ *Volume 7 Order, Qwest Application*, App. C, Vol. 1, Tab 29.1, at pp. 6-7.

facilitator recommended that Qwest take the unprecedented step of having its transactions between QC and QCC examined by KPMG. Qwest voluntarily filed the results of the independent test, which took place between April and August 2001, with the COPUC. The examination revealed a dozen instances in which Qwest did not comply with the FCC's affiliate transaction pricing rules. Afterwards, Qwest filed a supplemental KPMG declaration, which stated that Qwest had addressed all discrepancies identified in the original report and verified that additional controls to address those errors have been put into place. As a result of the record and KPMG's report, the hearing commissioner found that Qwest has diligently worked to ensure that timely accrual and billing for services provided by the § 272 affiliate will transpire in the future.

With regard to the separate officer, director, and employee requirements of § 272(b)(3), AT&T claimed that "[t]here is a revolving door atmosphere" between QC and QCC. Specifically, AT&T objected to the sharing of employees between QC and QCC.

The hearing commissioner found that Qwest had a number of appropriate safeguards in place, including nondisclosure agreements for employees who take positions in another Qwest entity, training to ensure compliance with § 272, separate offices for QC and QCC, and requiring employees leaving the § 272 affiliate to return all assets and account for all documents in their possession. There is no payroll overlap between QC and QCC.

The FCC has been silent as to whether there should be restrictions on the hiring of employees between the § 272 affiliate and a BOC. Regardless, Qwest has eliminated its

policy of sharing employees between QC and QCC and requires that employees be terminated by one entity before being rehired by the other entity.¹⁵⁵

Qwest clearly meets its obligations under § 272(b)(3).

Finally, in the May *en banc* hearings, AT&T raised a new argument that Qwest should be required to disaggregate its special access provisioning so the performance that QCC receives can be compared to the performance competitors receive under § 272(e). AT&T's argument is baseless for a number of reasons. First, special access services will be measured under the CPAP. Second, the FCC has made it clear that § 272(e)(1) "applies only when a BOC has an operational section 272 affiliate."¹⁵⁶ Third, Qwest will post performance reports on a public website following § 271 approval. On a going-forward basis, Qwest will comply with §272(e).

In short, the COPUC finds that Qwest satisfies the requirements of § 272. The record supports the conclusion that Qwest has implemented a number of § 272 safeguards and will comply with § 272 following interLATA entry. Because this is a predictive judgment, it is necessarily a modest one.

X. CONCLUSION

The COPUC has held a series of collaborative workshops to ensure Qwest's compliance with the 14-point checklist. The longest and most detailed SGAT ever, for better or worse, has been submitted to the FCC – the result of six COPUC staff reports, 12 hearing commissioner orders, and COPUC decisions. The COPUC has participated

¹⁵⁵ *Section 271 Compliance Order*, App. A, at 55.

¹⁵⁶ *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Notice of Proposed Rulemaking, FCC 01-339 (rel. Nov. 19, 2001), at ¶ 10.

exhaustively in the most rigorous OSS test ever and an ongoing CMP redesign process, which has resulted in an acceptable change management system. Phase 1 of a litigated pricing docket has concluded, with new, TELRIC-compliant, rates. The public interest test has been met, the separate affiliate requirement has been met, and Track A has been met. Most importantly, the COPUC has devised the most significant performance assurance plan in the country to date.

This recommendation has not attempted to encompass the entirety of the Colorado § 271 record. Rather, the COPUC here attempts to highlight controverted parts of the record, to anticipate objections that might be raised to the Qwest application, and to encapsulate our reasoning for deciding issues the way we did. The FCC is invited to go deeper into our record for a fuller explanation of our reasoning or to exhume the evidence upon which we base our conclusions.

In our proceeding, participants have been allowed to collaborate, have been afforded due process to present witnesses and to make arguments over controverted issues, and then been allowed still more process to make sure that all issues received full and complete treatment. The COPUC has a degree of confidence that it has treated all relevant issues in this § 271 record.

For the foregoing reasons, and pursuant to its authority under § 271(d)(2)(B) of the Act, the Colorado Public Utilities Commission recommends that the FCC approve Qwest's § 271 application to offer in-region, interLATA service in Colorado.

CONCURRING STATEMENT OF COMMISSIONER POLLY PAGE
WITH THE EVALUATION OF THE COLORADO PUBLIC UTILITIES
COMMISSION

*In the Matter of the Joint Application by Qwest Communications International, Inc., for
Authorization to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa,
Nebraska and North Dakota, WC Docket No. 02-148*

I concur with the findings of my colleagues in Decision No. C02-718, and their decision to recommend approval of the application of Qwest Corporation to provide in-region interLATA services in the state of Colorado. I write separately, however, because I was not a signatory to the final Commission decision.

It has been a long and arduous process to get us to this point. I have read the volumes of staff Reports from the checklist item workshops, the corresponding hearing commissioner decisions and Qwest's compliance filings. I have listened in on the hearing commissioner's many workshops, hearings, status conferences and technical workshops. I have participated in *en banc* workshops and decision meetings on Docket Nos. 99A-577T (the costing and pricing docket), 97I-198T (the SGAT docket), and 01I-041T (the CPAP docket). In addition, I was present for the first day of the three day final Commission *en banc* workshop on the ROC OSS test.

In preparing for this statement, I reviewed the transcripts from the final Commission workshop, the transcript from the Commission deliberations meeting on June 13, 2002, the advisory staffs' recommendations, and the resulting Commission decision, Decision No. C02-718.

I concur with the decisions of my fellow commissioners and the contingencies ordered as a result of those decisions (*e.g.*, the inclusion of PO-19 relating to the Stand Alone Test Environment in the CPAP).

I concur that Qwest has met the requirements for the Change Management Process, that the prices contained in Exhibit A to the SGAT are acceptable and meet TELRIC standards, and that Qwest has adopted the CPAP to prevent backsliding in the future.

In this large of an undertaking there will always be mistakes that are made, but for the overall benefit to the citizens of Colorado and the money saving possibilities Qwest's entry into the long distance market provides them, I agree with the decision that the Colorado Public Utilities Commission finds that Qwest has met the § 271 criteria and is ready to file an application to the FCC for 47 USC § 271 compliance.

I would like to thank the hearing commissioner, Chairman Gifford, and the Colorado staff for doing an excellent job over the past two and a half years. The citizens of Colorado can be proud of those individuals and the work they have done. I particularly concur with Chairman Gifford's statements in the final minutes of the June 13

deliberations meetings as it relates to our outstanding staff. I can not say it better, but also would point out that Chairman Gifford has put in many long hours as hearing commissioner. His dedication to this effort has been unmatched by any other state commissioner in the Qwest region.

<u>INDEX OF FULL CITATIONS</u>	
Short Citation	Full Citation
Commission Orders	
<i>Commission Order (Decision No. C01-1302)</i>	Decision No. C01-1302, <i>Commission Order</i> , Docket No. 99A-577T (Mailed Date Dec. 21, 2001).
<i>Decision on Applications for RRR (Decision No. C02-636).</i>	Decision No. C02-636, <i>Decisions on Application for Rehearing, Reargument, or Reconsideration</i> , Docket No. 99A-577T (Mailed Date June 6, 2002).
<i>Motion to Modify Volume 2A Order</i>	Decision No. R01-990-I, <i>Order Regarding Motions to Modify Decision Nos. R01-846 and R01-848</i> , Docket No. 97I-198T (Mailed Date Sept. 27, 2001).
<i>Motion to Modify Volume 5A Order</i>	Decision No. R01-1253-I, <i>Order Regarding Motions to Modify Decision No. R01-1141</i> , Docket No. 97I-198T (Mailed Date Dec. 7, 2001).
<i>Motion to Modify Volume 7 Order</i>	Decision No. R02-516-I, <i>Order Denying Motion to Modify Order on Staff Volume VII</i> , Docket No. 97I-198T (Mailed Date May 3, 2002).
<i>Ruling on Applications for RRR (Decision No. C02-409).</i>	Decision No. C02-409, <i>Ruling on Applications for Rehearing, Reargument, or Reconsideration</i> , Docket No. 99A-577T (Mailed Date Apr. 17, 2002).
<i>Section 271 Compliance Order</i>	Decision No. C02-718, <i>Commission Decision Regarding OSS, Section 272, Public Interest, Track A, Change Management Process, and Data Reconciliation and Commission Decision Regarding the Commission's Recommendation to the Federal Communications Commission Concerning Qwest Corporation's Compliance with Section 271</i> , Docket No. 02M-260T (Mailed Date June 26, 2002).
<i>SGAT Compliance Order</i>	Decision No. C02-406, <i>Commission Decision Regarding Statement of Generally Available Terms and Conditions, Change Management Process Impasse Issue, and SGAT Compliance with § 271</i> , Docket No. 97I-198T (Mailed Date Apr. 11, 2002).
<i>Volume 1A Order</i>	Decision No. R01-651-I, <i>Resolution of Volume 1A Impasse Issues</i> , Docket No. 97I-198T (Mailed Date June 22, 2001).
<i>Volume 2A Order</i>	Decision No. R01-848, <i>Resolution of Volume IIA Impasse Issues</i> , Docket No. 97I-198T (Mailed Date Aug. 17, 2001).

<i>Volume 3A Order</i>	Decision No. R01-1015, <i>Volume IIIA Impasse Issues</i> , Docket No. 97I-198T (Mailed Date Sept. 27, 2001).
<i>Volume 4A Order</i>	Decision No. R01-846, <i>Volume 4A Impasse Issues Order</i> , Docket No. 97I-198T (Mailed Date Aug. 16, 2001).
<i>Volume 5A Order</i>	Decision No. R01-1141, <i>Volume VA Impasse Issues</i> , Docket No. 97I-198T (Mailed Date Nov. 6, 2001).
<i>Volume 6A Order</i>	Decision No. R01-1193, <i>Resolution of Volume VIA Impasse Issues</i> , Docket No. 97I-198T (Mailed Date Nov. 20, 2001).
<i>Volume 7 Order</i>	Decision No. R02-318-I, <i>Order on Staff Volume VII Regarding Section 272, the Public Interest, and Track A</i> , Docket No. 97I-198T (Mailed Date Mar. 15, 2002).
FCC Orders	
<i>Ameritech Michigan Order</i>	<i>In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan</i> , CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (rel. Aug. 19, 1997).
<i>BANY Order</i>	<i>In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York</i> , CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. Dec. 22, 1999).
<i>BellSouth Georgia/Louisiana Order</i>	<i>In the Matter of Joint Application by BellSouth Corporation, et al, for Provision of In-Region, InterLATA Services in Georgia and Louisiana</i> , CC Docket No. 02-35, Memorandum Opinion and Order, FCC 02-147 (rel. May 15, 2002).
<i>Collocation Waiver Order</i>	<i>Deployment of Wireline Services Offering Advanced Telecommunications Capacity</i> , CC Docket No. 98-147, Memorandum Opinion and Order, 16 FCC Rcd 3748 (rel. Nov. 7, 2000).
<i>Local Competition First Report and Order</i>	<i>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</i> , CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996).

<i>SBC Arkansas/Missouri Order</i>	<i>In the Matter of Joint Application by SBC Communications Inc., et al, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri, CC Docket No. 01-194, Memorandum Opinion and Order, FCC 01-338 (rel. Nov. 16, 2001).</i>
<i>SBC Kansas/Oklahoma Order</i>	<i>In the Matter of Joint Application by SBC Communications, et al, for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29 (rel. Jan. 22, 2001).</i>
<i>SBC Texas Order</i>	<i>In the Matter of Application by SBC Communications, Inc., et al, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238 (rel. June 30, 2000).</i>
<i>Supplemental Order and Clarification</i>	<i>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Supplemental Order and Clarification, FCC 00-183 (rel. June 2, 2000).</i>
<i>UNE Remand Order</i>	<i>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999).</i>
<i>Verizon Maine Order</i>	<i>In the Matter of Application by Verizon New England Inc., et al, for Authorization to Provide In-Region, InterLATA Services in Maine, CC Docket No. 02-61, Memorandum Opinion and Order, FCC 02-187 (rel. June 19, 2002).</i>
<i>Verizon New Jersey Order</i>	<i>In the Matter of Application by Verizon New Jersey, Inc., et al, for Authorization to Provide In-Region, InterLATA Services in New Jersey, WC Docket No. 02-67, Memorandum Opinion and Order, FCC 02-189 (rel. June 24, 2002).</i>
<i>Verizon Rhode Island Order</i>	<i>In the Matter of Application by Verizon New England, et al, for Authorization to Provide In-Region, InterLATA Services in Rhode Island, CC Docket No. 01-324, Memorandum Opinion and Order, FCC 02-63 (rel. Feb. 22, 2002).</i>

<i>Verizon Vermont Order</i>	<i>In the Matter of Application by Verizon New England Inc., et al, for Authorization to Provide In-Region, InterLATA Services in Vermont, CC Docket No. 02-7, Memorandum Opinion and Order, FCC 02-118 (rel. Apr. 17, 2002).</i>
Qwest Application and Related Materials	
<i>KPMG Final Report</i>	<i>Qwest Communications OSS Evaluation, Final Report, KPMG Consulting (submitted May 28, 2002).</i>
<i>Qwest Application</i>	<i>Brief of Qwest Communications International Inc. in Support of Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska and North Dakota, In the Matter of Qwest Communications International Inc. Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska and North Dakota, WC Docket No. 02-148 (June 13, 2002).</i>

LIST OF APPENDICES

Appendix A	Decision No. C02-718, <i>Commission Decision Regarding OSS, Section 272, Public Interest, Track A, Change Management Process, and Data Reconciliation and Commission Decision Regarding the Commission's Recommendation to the Federal Communications Commission Concerning Qwest Corporation's Compliance with Section 271</i> , Docket No. 02M-260T (Mailed Date June 26, 2002).
Appendix B	<i>Qwest Corporation's Notice of Compliance Filing</i> , Docket No. 02M-260T (filed June 13, 2002).
Appendix C	<i>Qwest Corporation's Notice of Filing</i> , Docket No. 02M-260T (Filed June 28, 2002).
Appendix D	Decision No. C02-739, <i>Commission Decision Accepting Compliance Filings</i> , Docket No. 02M-260T (Mailed Date July 2, 2002).